

IN THE ARBITRATION UNDER CHAPTER 11
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

- - - - - -x
CANFOR CORPORATION, :
 :
 :
 Claimant/Investor, :
 :
 and :
 :
 UNITED STATES OF AMERICA, :
 :
 :
 Respondent/Party. :
 :
 - - - - - -x Volume 2

Wednesday, December 8, 2004

The World Bank
701 18th Street, N.W.
"J" Building
Assembly Hall B1-080
Washington, D.C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:37 a.m. before:

PROF. EMMANUEL GAILLARD, President

PROF. JOSEPH WEILER, Arbitrator

MR. CONRAD HARPER, Arbitrator

Also Present:

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Tribunal

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1 P R O C E E D I N G S

2 PRESIDENT GAILLARD: Good morning, ladies
3 and gentlemen. We resume the hearing in the second
4 day of the hearing in the arbitration between
5 Canfor Corporation and the United States of
6 America. This morning we are going to hear the
7 reply of the U.S., and then surreply, and then we
8 will get into the questions and answers.

9 So, if you are ready to start, I don't
10 know who starts, I'm sorry.

11 Housekeeping matters first. You should
12 have--on my side I have one. You should have
13 received now, and I'm afraid have you not received
14 it before, the hard copy version of the transcript
15 of yesterday.

16 Can you confirm that you have? You all
17 have received it, both parties; right?

18 MR. LANDRY: We have, yes.

19 PRESIDENT GAILLARD: Right.

20 MR. CLODFELTER: As has the United States,
21 yes.

22 PRESIDENT GAILLARD: Okay. Are there

1 other housekeeping matters or procedural issues?

2 MR. LANDRY: One minor issue,
3 Mr. President. We have sitting at the table with
4 us, and I wanted to formally introduce for the
5 record another co-counsel, and his name is Patrick
6 Macrory from the International Law Institute.

7 PRESIDENT GAILLARD: Welcome.

8 Any other procedural issues?

9 Who is going to--Mr. Clodfelter, please,
10 the floor is yours.

11 REPLY STATEMENT BY THE UNITED STATES

12 MR. CLODFELTER: Thank you, Mr. President.
13 I will begin the United States's rebuttal this
14 morning by making a couple of general points, and
15 then I will turn the floor over to Ms. Menaker and
16 Mr. McNeill for additional comments.

17 The two points I would like to make are,
18 one, what does the nature of the conduct that is
19 the basis for these claims have to say about the
20 meaning of Article 1901(3)? And then I would like
21 to address the general question of the effects of
22 the parties' respective interpretations of 1901(3).

1 So, first, what does the nature of the
2 conduct which has been alleged as the basis for
3 these claims say about the meaning of Article
4 1901(3)? Yesterday, we heard a great deal of
5 discussion about object and purpose and how that
6 may shed light upon the meaning of Article 1901(3).

7 We heard somewhat less discussion about
8 Article 1901(3)'s context. Mr. McNeill will
9 address points with respect to both of those
10 discussions later on.

11 We heard even less about the ordinary
12 meaning of the text of Article 1901(3), and only at
13 the end of the day continuing Canfor's practice of
14 subordinating the actual language of Article
15 1901(3) to object and purpose and context.

16 Ms. Menaker will address this general
17 point as well as specific points on the ordinary
18 meaning of the text in a few minutes.

19 What we heard very little about, however,
20 was the actual conduct which was the basis for the
21 claim before you. Claimant counsel yesterday
22 pretty much limited itself to broad

1 characterizations of that conduct. Early on,
2 Mr. Landry did just about everything he could to
3 distance Canfor's claims from American antidumping
4 and countervailing duty law. You will recall that
5 he rejected the United States's characterization of
6 the claims as antidumping and countervailing duty
7 claims, and portrayed them instead as claims for
8 violations of the substantive obligations of
9 Chapter 11, referring the Tribunal to paragraph 20
10 of the Notice of Arbitration and Statement of
11 Claim, which states that the claim arises from the
12 unfair, inequitable, and discriminatory treatment
13 of the Canadian softwood lumber industry, including
14 Canfor, or more particularly, Canfor and the
15 subsidiaries by the Government of the United
16 States.

17 A review of the treatment received by the
18 Canadian softwood lumber industry over the past 20
19 years demonstrates a pattern of conduct designed to
20 ensure a predetermined, politically motivated, and
21 results-driven outcome to the investigations
22 resulting in the various determinations that are at

1 issue in this case.

2 Now, one thing that's clear from that
3 paragraph is that what Canfor is really trying to
4 do here is put the entire American antidumping and
5 countervailing duty system on trial, a system which
6 the parties, including Canfor's own government,
7 agreed to leave in place in the middle of this
8 20-year period of allegedly egregious conduct.

9 But neither Mr. Landry's comments nor
10 paragraph 20 really accurately describe the conduct
11 which has been alleged as the basis for this claim.
12 In order to understand what this claim is about,
13 you have to look at the detailed allegations set
14 forth in the remainder of the Statement of Claim.
15 And if you do and when you do, I'm going to walk
16 you through some of this. What you will find is
17 that all of the conduct which Canfor alleges as the
18 basis for this claim is conduct in the
19 administration of the U.S. antidumping and
20 countervailing duty law.

21 We take a minute to run through the
22 allegations you will find in the remainder of the

1 Statement of Claim. Paragraph 98 cites the failure
2 to impose duties on U.S. producers, and entitling
3 those producers to receive duties collected from
4 Canadian products--producers. Paragraph 108, it
5 cites the six preliminary and final determinations
6 themselves as the actions which violate Chapter 11.
7 In paragraphs 110, 116, 120, 123, and 127, it cites
8 the, quote, actions of the Department of Commerce
9 in arriving at, unquote, and then each of the
10 various determinations. Paragraph 124, it cites,
11 quote, The entire course of conduct of the
12 Department of Commerce in reaching the final
13 determination on the countervailing duty petitions,
14 end quote. Paragraphs 130 and 133, it cites the
15 imposition of duties. Paragraph 30 also cites,
16 quote, subjecting Canfor to the antidumping duty
17 regime, unquote. Paragraphs 134 and 135, various
18 alleged due process deficiencies in the antidumping
19 and countervailing duty investigations. Paragraph
20 137 and 140, failure to establish company-specific
21 rates for countervailing duties. Paragraph 141,
22 intention to distribute collected duties to U.S.

1 producers and so on.

2 Now, before we turn to the main point I
3 want to make about these specific allegations of
4 conduct, I want to make two related points. First,
5 these are the claims for which Canfor gave notice
6 and submitted to arbitration, and it is on the
7 basis of these claims that the decision on
8 jurisdiction must be made. Therefore, even though
9 we have not heard Canfor's answer yet to the
10 questions posed yesterday and the suggestion made
11 by you, Mr. President, about whether or not they
12 were, in their briefs, seeking to amend or
13 supplement their claims, let me state in advance
14 that it would be the United States's position to
15 strongly oppose any such amendment or supplement.

16 Unlike commercial arbitration, the
17 requirements for noticing and submitting to
18 arbitration claims under NAFTA are very strict. No
19 new measures may be cited as the basis for claims
20 in this case absent compliance with those
21 requirements.

22 And the second subsidiary point I want to

1 make about this is that it is very unclear how the
2 conduct alleged in these paragraphs constitute,
3 quote, measures, unquote, within the meaning of
4 Article 1101. First of all, many of them are only
5 vaguely stated. It could hardly be fairly said to
6 describe conduct at all.

7 But more importantly, how they fall within
8 NAFTA's definition of measures and not within
9 NAFTA's definition of antidumping and
10 countervailing duty law is extremely unclear, and
11 Ms. Menaker will address that question a little
12 later this morning. But, of course, the main point
13 is that all of the conduct alleged by Canfor as the
14 basis for its claim is conduct in the
15 administration of the U.S. antidumping and
16 countervailing duty law. Therefore, the
17 proposition that Canfor would have you accept in
18 their interpretation is that even though they claim
19 that the United States's administration of its
20 countervailing and antidumping law is subject to
21 the requirements of Chapter 11, it still cannot be
22 said that Chapter 11 imposes obligations with

1 respect to that law.

2 So, even though they maintain that the
3 United States's administration of its antidumping
4 and countervailing duty law must comport with the
5 substantive allegations of Section A of Chapter 11,
6 and even though the U.S., they say, is bound by
7 Section B of Chapter 11 to arbitrate claims based
8 upon the administration of that law, somehow
9 Chapter 11 does not impose obligations with respect
10 to that law.

11 Seen in these stark terms, Canfor's
12 proposition is patently absurd. So, as tempting as
13 it may be to dwell upon the weeds of the arguments
14 and parse the terms of the agreement, in its
15 clearest and starkest terms, Canfor's
16 interpretation is simply not sustainable.

17 The second general point I would like to
18 address are the various allegations and questions
19 that were raised about the effects of the parties'
20 respective proposed interpretations of Article
21 1901(3). First of all, let me react to comments by
22 counsel yesterday in the Canfor briefs which

1 repeatedly allege that the United States's
2 interpretation would amount to immunizing egregious
3 conduct that violates customary international law.
4 And, of course, this is not the case. First of
5 all, it ignores the fact that the parties chose to
6 subject such conduct as it relates to antidumping
7 and countervailing duty law to the special
8 processes of Chapter 19. That was the parties'
9 choice. That's how they chose to discipline that
10 conduct. No way can it be said to immunize it.

11 And even if they cannot bring a claim
12 under Chapter 11, their government is free to
13 espouse a claim of violation of customary
14 international law against the United States
15 Government, a claim it has not espoused, I might
16 add, and therefore, it is completely inaccurate to
17 claim that this conduct is somehow immunized under
18 the American proposed interpretation.

19 The second--

20 PRESIDENT GAILLARD: Do you mind if we ask
21 a question for clarification?

22 MR. CLODFELTER: Yes.

1 ARBITRATOR WEILER: Just to understand,
2 you said that the Government of Canada would be
3 free to bring a claim against the United States for
4 violation of customary international outside the
5 NAFTA?

6 MR. CLODFELTER: Yes.

7 ARBITRATOR WEILER: Outside the NAFTA?

8 MR. CLODFELTER: Yes.

9 ARBITRATOR WEILER: So even though the
10 NAFTA says that AD and CVD conduct has to be
11 disputed under Chapter 19, according to your
12 construction, they would be able to circumvent
13 that, say we just bring it under public
14 international law normally? Just to clarify, is
15 that the position?

16 MR. CLODFELTER: Yes, but I want to
17 clarify my clarification, if I might. Article
18 1901(3) says--no other chapter of NAFTA imposes
19 obligations with respect to antidumping and
20 countervailing duty law. The right of Canada to
21 invoke diplomatic protection of Canfor for
22 violations of customary international law is, of

1 course, not created by a chapter of NAFTA; so,
2 there is no inconsistency between that right and
3 Article 1901(3).

4 PRESIDENT GAILLARD: I think we understand
5 the position, and we will refrain, I think we
6 should keep questions until you're done, unless
7 it's questions of clarification.

8 ARBITRATOR WEILER: I apologize.

9 PRESIDENT GAILLARD: That's fine.
10 Questions for clarification, but we will keep the
11 rest because we have other questions, and we will
12 ask them after you have finished, I guess.

13 MR. CLODFELTER: Let me add one other
14 point to that. Of course, there is no existing
15 regime for invoking third party dispute resolution
16 of that claim. It's a matter of diplomatic
17 protection, formal espousal, and diplomatic
18 negotiation.

19 The second question relating to the
20 effects of U.S. interpretation of 1901(3) relates
21 to the question you posed, Mr. President, about the
22 risks that by labeling otherwise violative conduct

1 as antidumping and countervailing duty law, that
2 somehow a state could shield itself from Chapter 11
3 claims, and you also mentioned the possibility of
4 with respect to the use of competition laws and the
5 implications of Chapter 15.

6 I'll make a number of points, but the
7 general point is that a party may not avoid Chapter
8 11 merely by labeling its conduct as antidumping
9 and countervailing duty law. If a matter is not
10 genuinely subject to obligations with respect to
11 AD/CVD law, simply calling it AD/CVD law will not
12 shield a state from Chapter 11 implications. The
13 Tribunal is free to look to see if, in fact, it is
14 conduct subject to obligations with respect to
15 antidumping and countervailing duty laws.

16 So, fraudulent attempts to disguise
17 otherwise violative behavior cannot be shielded by
18 1901(3). At the same time, however, if, in fact,
19 conduct is AD/CVD law or its application, then
20 Chapter 11 is simply not available. So, even if
21 the application of antidumping or countervailing
22 duty law could be said to somehow violate the

1 substantive standards of Section A, Chapter 11 is
2 simply not available for it. I have another
3 comment to say about that in a second. That is
4 with respect to the third question of the effect of
5 the U.S. interpretation that was raised by
6 Professor Weiler, and this is a question of
7 comparative advantage among various classes of
8 investors.

9 You asked whether or not the
10 interpretations would advantage, for example,
11 non-NAFTA investors who are not party, say, to a
12 BIT, and in that case clearly there is no advantage
13 whatsoever. In both cases, both the NAFTA--the
14 NAFTA party and the non-NAFTA party would have a
15 right to seek invocation by their government of
16 diplomatic protection of the claim.

17 In fact in that case, of course, the NAFTA
18 investor is advantaged because it has recourse to
19 Chapter 19 whereas the non-NAFTA investor would
20 not.

21 With regard to the non-NAFTA BIT investor,
22 the first point that I wanted to elaborate a bit

1 here is it is for us extremely difficult to
2 conceive of how actions in the area of antidumping
3 and countervailing duties could amount to a
4 violation of any of the standards of Chapter 11,
5 and I don't mean this merely rhetorically. You've
6 asked for examples. We avidly await them because
7 it's very difficult to see how this could occur.

8 And as an aside let me just mention that
9 Canfor's reliance on the ELSI case is, of course,
10 misplaced because the issue before the ICJ in that
11 case was not any customary international law,
12 minimum standard, or treatment question. It was
13 the interpretation of a specific prohibition in a
14 treaty between the United States and Italy banning
15 arbitrary conduct. So, its consideration of what
16 arbitrary means has nothing to do with customary
17 international law minimum standard of treatment.
18 It was clearly an interpretive question of a term
19 in a treaty.

20 And just to clarify, there is no general
21 prohibition in customary international law for
22 arbitrary treatment, and we think that's absolutely

1 clear.

2 Having made those remarks, however, if it
3 were possible for conduct in the area of
4 antidumping and countervailing duty regimes to
5 violate the substantive obligations of Chapter 11,
6 a BIT investor conceivably could invoke the
7 investor-state dispute provisions of a BIT while a
8 NAFTA investor would be barred by Article 1901(3).
9 We do not believe that this is of any import with
10 respect to the question before you.

11 Mr. Weiler, you indicated you're not sure
12 it weighs either way in terms of the interpretation
13 question. We agree because there are many
14 variations among BITs. It could hardly be said
15 that the level of protection afforded is equal in
16 every single BIT. I mean, the clearest example, of
17 course, is that some of the United States BITs
18 includes protections for and provides
19 investor-state dispute resolution with respect to
20 violations of investment agreements. NAFTA does
21 not.

22 So, in that respect, investors from

1 countries, parties to those kinds of BITs have a
2 clear advantage over NAFTA investors. We just
3 don't think it matters, and it has no relationship
4 to the question before you now.

5 Let me close by just making a couple of
6 comments about the effects of Canfor's proposed
7 interpretation of 1901(3). It also would have--it
8 would clearly have effects. One clear effect is
9 that it will put Chapter 11 Tribunals on a
10 collision course with Chapter 19 tribunals. The
11 mechanism the parties chose to decide complaints
12 about antidumping and countervailing duty law, the
13 risk of conflicting decisions on issues is very
14 clear. For example, the first antidumping--the
15 first decision by the antidumping Chapter 19 Panel
16 rejected Canfor's due process allegations that are
17 common with the due process allegations here, and
18 yet they continue making them here. If there is
19 jurisdiction over this claim, they're going to ask
20 you to rule those due process violations as
21 violative of international law.

22 But more importantly, of course, is,

1 Canfor's interpretation would overturn the
2 conscious choice of the NAFTA parties to shield
3 antidumping and countervailing duty law and its
4 application from the disciplines of other chapters
5 of NAFTA including Chapter 11, and for this reason
6 you should reject it.

7 Those are the end of my general remarks.
8 I would now like to ask you to turn the floor over
9 to Ms. Menaker.

10 PRESIDENT GAILLARD: Ms. Menaker, have you
11 the floor.

12 MS. MENAKER: Thank you, Mr. President,
13 members of the Tribunal, good morning. This
14 morning I will attempt to heed the Tribunal's
15 advice, which it gave yesterday, which is that I
16 will only respond to a few of the points that
17 Canfor made yesterday that I think warrant
18 responses. I will not, however, attempt to answer
19 each and every question raised by the members of
20 the Tribunal that may have touched upon something
21 that I spoke about yesterday. That being said, I
22 think it is a fair presumption on my part that if

1 those questions remain important in your mind that
2 you will raise them with us this afternoon.

3 PRESIDENT GAILLARD: That's a fair
4 presumption. We will raise a number of questions
5 either later this morning or this afternoon, and if
6 we have not raised the questions in which you
7 wanted to clarify something or make a point, that
8 goes for both sides, of course. At the end you
9 will let us know, so there will be a sort of a
10 general question, have we forgotten anything you
11 want to say, so you will certainly have ample
12 opportunity.

13 And I think it's wise to wait for your
14 answers when we put it in the context of what our
15 questions are, because you will have this
16 opportunity shortly. So, it's a good way to
17 proceed.

18 MS. MENAKER: Okay. Thank you.

19 Now, I will just make a few brief comments
20 regarding the ordinary meaning of Article 1901(3).
21 You will recall that yesterday we began our
22 arguments discussing that ordinary meaning, and any

1 interpretation of the Treaty must, of course, begin
2 with the interpretation of the provision of the
3 text which the Tribunal is, in fact, looking at.
4 And with due respect, in this regard it is our
5 submission that Canfor has gone about its task
6 backwards. It has begun its discussion both in its
7 written submissions and yesterday in its argument
8 by focusing on the object and purpose of the Treaty
9 and then its context, all the while presuming
10 jurisdiction, and only at the very end discussing
11 the ordinary meaning of the provision.

12 And we believe that this is of utmost
13 importance that the Tribunal, in fact, first look
14 at the provision in question, Article 1901(3), and
15 determine how that provision ought to be
16 interpreted in good faith in its context.

17 And I would just direct the Tribunal to
18 the decision in the Chapter 11 case of ADF versus
19 the United States, which we cited in our reply, and
20 I quote from that decision briefly. Quote, We
21 understand the rules of interpretation found in
22 customary international law to enjoin us to focus

1 first on the actual language of the provision being
2 construed. The object and purpose of the parties
3 to a Treaty, in agreeing upon particular paragraph
4 of that treaty are found to be in the first
5 instance in the words in fact used by the parties
6 in that paragraph. The general objectives of NAFTA
7 may frequently cast light on a specific
8 interpretive issue, but they are not to be regarded
9 as overriding and superseding the latter.

10 And in effect, we believe that that is
11 what Canfor's interpretation has done.

12 Now, as Mr. Clodfelter mentioned, he
13 quoted from paragraph 20 of Canfor's Notice of
14 Arbitration, and that you may recall is the same
15 paragraph which I placed on the screen yesterday to
16 describe Canfor's claims as all directed towards
17 the conduct of U.S. agencies that adopted the
18 investigations at issue. And Canfor, indeed,
19 yesterday characterized that paragraph as the best
20 summary of its claim.

21 As Mr. Clodfelter just noted, all of the
22 conduct that Canfor has challenged in its Notice of

1 Arbitration all concerns the administration and the
2 application of U.S. antidumping and countervailing
3 duty law. It is clear in our minds that any
4 obligation imposed on the United States with
5 respect to that law would, therefore, violate
6 Article 1901(3). I spent some time yesterday
7 talking about the definition of the phrase "with
8 respect to," and I don't intend to repeat those
9 arguments here. I would just note for the Tribunal
10 that in response, Canfor conceded that the term
11 "with respect to" might have a broader meaning
12 where it is used in other Articles in the NAFTA.
13 It nevertheless stated quite conclusively that in
14 Article 1901(3) that same term should be
15 interpreted more narrowly. However, it gave no
16 reason for interpreting the term other than in
17 accordance with its ordinary meaning, and it gave
18 no reason why the term in Article 1901(3) should
19 deemed to be more narrow than the term as it is
20 otherwise used throughout various provisions of the
21 NAFTA. It is our submission that there is no
22 plausible reason for giving such an interpretation

1 to that term.

2 We would now like to turn to two arguments
3 that Canfor made yesterday. One was with respect
4 to the definition of antidumping law and
5 countervailing duty law, and specifically our
6 contention that that term that--excuse me, the
7 antidumping and countervailing duty determinations
8 at issue here fall within the term are, in fact, an
9 example of an administrative practice, and
10 therefore constitute antidumping law and
11 countervailing duty law. And second, I will make a
12 few comments on Canfor's remarks concerning the
13 significance of the use of the term "law" in
14 Article 1901(3) rather than the use of the term
15 "measure."

16 As I stated yesterday, antidumping and
17 countervailing duty determinations are an example
18 of an administrative practice. These
19 determinations are issued by administrative
20 agencies and administrative practices built up by
21 agency decisions, including issuance of
22 determinations.

1 Now, there is no definition in Article 19
2 or anywhere else in the NAFTA of the term
3 "administrative practice." There is, however, a
4 definition of that term in the Canada-U.S. Free
5 Trade Agreement, albeit in a separate chapter of
6 that agreement. It's in the financial services
7 chapter of that agreement, but I will quote that
8 definition to you because I think it does shed some
9 light on the common usage of that term.

10 In Article 1706 of that agreement, it
11 states, and I quote, Administrative practices means
12 all actions, practices, and procedures by any
13 Federal agency having regulatory responsibility
14 over the activities of financial institutions
15 including, but not limited to, rules, orders,
16 directives, and approvals.

17 So, in that case, when we are talking
18 about an agency, a Federal agency that regulates
19 financial institutions, that agency may issue
20 rules, and it may also grant or deny approvals for
21 financial institutions to engage in certain
22 conduct. Those approvals and those denials of

1 approvals are all considered part of that agency's
2 administrative practice, as that term is defined.
3 We think that is the common usage of the term, and
4 the same could be said here. The Federal agencies
5 that are involved in administering the United
6 States's trade laws, they too at times promulgate
7 rules and regulations; that is part of their
8 administrative practice. These agencies also issue
9 and make determinations, and that, too, constitutes
10 a form of their administrative practice.

11 Now, although we have been looking at the
12 way in which we have been referring to the sentence
13 in both Article 1902(1) and 1904(2), and have been
14 referring to that as a definition of antidumping
15 and countervailing duty law, I would also note that
16 that is not a definition that is in the
17 definitional section of Chapter 19. It is not one
18 of the term that is defined in the back of the
19 chapter as a definition.

20 So, the fact that the term may be used in
21 a manner in Article 1904(2), for instance, does not
22 restrict in any way that term's meaning as far as

1 the general usage is concerned.

2 Now, yesterday, Canfor argued that because
3 Article 1904 directs an agency when issuing its
4 determinations to look at antidumping and
5 countervailing duty law, and included among the
6 things that the agencies ought to be looking at,
7 administrative practices, that the determination
8 itself could not be considered an administrative
9 practice. And that is simply incorrect, in our
10 view.

11 In the United States, the Legislative
12 Branch adopts statutes, and statutes are clearly
13 within the definition of law. The Judicial Branch
14 renders decisions, and judicial precedent is also a
15 form of law. The Executive Branch's agencies in
16 this area make determinations. And that is an
17 administrative practice that is also law.

18 All of these actions taken by any of these
19 three branches of government impose rules and
20 requirements on a party, and whether that rule or
21 requirement is imposed by virtue of a statute, by
22 virtue of a decision of a court, or by a

1 determination made by an administrative agency, it
2 is a legal rule and is encompassed within the term
3 "law" as that term is used in Article 1901(3).
4 Determinations in this area have the force of law.
5 They are binding on the parties in that regard.

6 Yesterday, Canfor opined that a
7 determination might be considered to be an
8 administrative practice, but only if it were
9 binding, and again, there is no reason for
10 importing that requirement into the definition of
11 an administrative practice. When--the fact is,
12 though, that when issuing determinations, the
13 agencies, the agencies in the United States that do
14 this, the Department of Commerce and the
15 International Trade Commission, do take their past
16 administrative practice into consideration, and
17 that practice is embodied in the determinations
18 that they have previously issued. They are
19 supposed to apply the same methodologies in one
20 investigation that they have applied in another,
21 and, in fact, not doing so may lead to a ground for
22 a challenge of a particular determination.

1 So, although in some manner of speaking,
2 the determinations may not have the binding effect
3 of a judicial decision that may be binding on a
4 particular court, they are certainly looked to as
5 precedent in some regard, and they are followed,
6 and that is, in fact, how the administrative
7 practice is developed within those agencies.

8 I would now like to turn to the argument
9 that Canfor made regarding the import of the fact
10 that the word antidumping and countervailing duty
11 law is used in Article 1901(3) rather than the term
12 antidumping or countervailing duty measure.

13 The first thing that I would direct the
14 Tribunal's attention to is the fact that the
15 definition of measure that is set forth in
16 Article 201 of the NAFTA is not an exhaustive
17 definition. It is inclusive. It states a measure
18 includes any law, regulation, procedure,
19 requirement, or practice.

20 The same is true for the definition of
21 antidumping law and countervailing duty law
22 contained in Article 1902(1). That also says

1 antidumping law and countervailing duty law

2 include, as appropriate for each party.

3 Neither of those definitions are

4 exhaustive definitions. They are both open-ended.

5 In fact, in other places the NAFTA did include

6 exhaustive definitions when what they meant to say

7 is a certain term includes these things and only

8 these things. And as an example, I would direct

9 the Tribunal's attention to the country-specific

10 determinations--definitions, excuse me--in Chapter

11 19 of the NAFTA, whereby the parties clearly say,

12 for example, "antidumping statute means" and "a

13 final determination means." Those are exhaustive

14 definitions.

15 Similarly, in the definition section in

16 Chapter 11, one can see a difference drawn between

17 an open-ended definition and a closed set--a closed

18 definition. You have the definition of enterprise

19 of a party as a closed definition. Enterprise of a

20 party means an enterprise constituted or organized

21 under the "Lava" party, et cetera, whereas an

22 equity or a debt security, the definition there is

1 an open-ended definition it. It says, includes.

2 PRESIDENT GAILLARD: Excuse me, you're
3 quoting from which provision?

4 MS. MENAKER: I was quoting from some of
5 the definitional section in Chapter 11, 1139.
6 There are a number of other definitions there.

7 PRESIDENT GAILLARD: Thank you.

8 MS. MENAKER: Now, Canfor has stated in a
9 conclusory manner that if the parties wanted
10 covered what the United States claims Article
11 1901(3) to cover, they ought to have used the word
12 measure, but it offers no support for that
13 argument. As Mr. Clodfelter mentioned, in order to
14 bring a Chapter 11 claim, a claimant must challenge
15 a measure of another party. If you take a look at
16 the scope and coverage of Chapter 11 in Article
17 1101, it says that this chapter applies to measures
18 adopted or maintained by a party.

19 So, what is the measure that Canfor is
20 challenging here? If you turn once again to the
21 definition of measure in Article 201, you will see
22 that that definition is almost identical to the

1 definition given of antidumping or countervailing
2 duty law that is set forth in Article 1902(1).

3 Now, if it is Canfor's position that they
4 are challenging the United States's antidumping or
5 countervailing duty law and measure includes any
6 law and therefore that is the measure they are
7 challenging, then clearly what they are saying is
8 law, in that sense, includes the application and
9 the administration of that law, and they,
10 therefore, cannot contend that the definition of
11 antidumping law or countervailing duty law does not
12 similarly encompass the administration and
13 application of the law.

14 Or if, on the other hand, if they are
15 contending that the conduct that they are
16 challenging in this Chapter 11 proceeding is a
17 practice, and therefore that constitutes a measure,
18 Canfor has not given any plausible reason why that
19 practice is not an administrative practice since
20 the conduct that has been taken has been taken by
21 the administrative agencies in this case.

22 So, we see no distinction between a

1 practice as defined as one of the definitions of a
2 measure given in Article 201 and the administrative
3 practice which is a definition of antidumping and
4 countervailing duty law in Article 1902(1).

5 So, it's clear to the extent that Canfor
6 is challenging a measure in this Chapter 11
7 proceeding, we see no basis on which it can
8 conclude that it has identified a measure and yet
9 can claim that that measure does not fall within
10 the definition of antidumping law or countervailing
11 duty law as set forth in Article 1902(1).

12 Canfor yesterday questioned the relevance
13 of the Chapter 11 UPS versus Canada case that the
14 United States has relied upon. Its relevance lies
15 in the fact that UPS made the same argument that
16 Canfor is making here. In that case, UPS argued
17 that Article 2103 excluded only challenges to a tax
18 law itself. UPS claimed that because it was
19 challenging the manner in which the tax law was
20 applied to it, Article 2103 didn't apply.

21 Now, yesterday Canfor said that this
22 Tribunal could not read anything into that decision

1 because the claim was abandoned by UPS, and the
2 issue was never argued in the case. In our view
3 that's simply incorrect. This issue was, indeed,
4 argued in the case. It was not argued orally, but
5 we have submitted with our written submissions some
6 of the pleadings that have been made in that case,
7 and you will see that that issue was, indeed,
8 briefed. The United States, which was not a party
9 to that proceeding, did make a submission, pursuant
10 to Article 1128 in that case on this very issue,
11 and UPS responded in writing to the United States's
12 submission.

13 I would direct the Tribunal's attention to
14 UPS's response in that regard because it is
15 remarkably similar to Canfor's position in this
16 case, and I will just quote from that. UPS stated,
17 and I quote, If the NAFTA parties had intended that
18 the failure to apply their tax laws would
19 constitute a taxation measure, certainly the NAFTA
20 parties would have made this explicit in the NAFTA,
21 end quote.

22 It went on to say, quote, a review of the

1 merits is required in the present circumstances.
2 To permit the Tribunal to determine whether the
3 failure in question is a taxation failure or a more
4 general action that is discriminatory, unfair, or
5 unequal. Moreover, it would be contrary to the
6 objectives of NAFTA to permit a government to style
7 a measure as a taxation measure in order to avoid
8 an impartial and independent review.

9 It then stated later that dispute
10 settlements, and I quote, dispute settlement is a
11 basic right under the NAFTA, and so restrictions on
12 this right should not be inferred unless they have
13 been stated in clear and unambiguous language.

14 It continued that, quote, The term
15 taxation measures used in NAFTA Article 11--excuse
16 me, Article 2103--does not clearly and
17 unambiguously exclude from dispute settlement under
18 NAFTA Chapter 11 a claim made under NAFTA Article
19 1105 simply because the wrongful treatment of the
20 investor takes place in a factual context that
21 involves taxation. There is no provision of the
22 NAFTA that clearly and unambiguously states that

1 unfair and inequitable treatment that would
2 otherwise be actionable under NAFTA Chapter 11 is
3 unactionable merely because--by virtue of a
4 taxation dimension to the facts of such
5 mistreatment.

6 Now, it is true that UPS abandoned its
7 argument at the oral argument, but the UPS case is
8 still ongoing. It has been ongoing for a long
9 time. It is hardly a very hard-fought case. There
10 has been extensive discovery in that case, and we
11 submit a claimant doesn't abandon a good argument.
12 That argument was abandoned because it was clearly
13 precluded. The Tribunal clearly had no
14 jurisdiction over the 1105 claim in that case, and
15 this is made clear by the Tribunal's remarks in its
16 decision on jurisdiction.

17 The Tribunal noted that the parties had
18 agreed that that claim would be withdrawn, and they
19 said, quote, we simply note that while Article 2103
20 provides that nothing in the agreement applies to
21 taxation measures, one of the limits to that
22 exception is that Article 1102, but not Article

1 1105, does apply to taxation measures, with
2 exceptions that are not relevant.

3 Accordingly, the position taken by the two
4 parties, the position that was taken by the two
5 parties is the agreement to withdraw that claim
6 from the arbitration, appears to conform exactly
7 with the agreement. So, that Tribunal agreed that
8 the 1105 claim was not within their jurisdiction.

9 Now, ironically Canfor points to the
10 decision at issue in the UPS claim. The Article
11 11--2103 as an example of a provision that clearly
12 precludes jurisdiction over a certain subject
13 matter. It urges this Tribunal to reject our
14 interpretation of 1901(3) because it says we should
15 have used the term antidumping measure or
16 countervailing duty measure as the drafters did in
17 Article 2103. However, in the UPS claim, the
18 claimant argued that that was not clear, and it was
19 not unambiguous. In fact, they said, if the
20 drafters had wanted to exclude that type of claim,
21 they could have done so clearly and unambiguously,
22 and Article 2103 does not do that. And as you

1 know, Canfor's counsel was UPS's counsel in that
2 case.

3 So, we believe it is just simply
4 disingenuous for a claimant to simply argue that
5 Article 1901(3) is not a clear exception, and that
6 the exception should have been drafted in the
7 manner of Article 2103. Of course, Canfor here
8 does not have the flexibility that UPS had in its
9 other claim, because UPS could abandon the claim
10 that was clearly barred by the clear jurisdictional
11 prohibition in Article 2103 and still have some of
12 its claims survive. Canfor cannot do that here
13 because Article 1901(3), unlike Article 2103, does
14 not contain any exceptions. It bars all
15 obligations with respect to antidumping and
16 countervailing duty law.

17 I just to want make one final point. This
18 is regarding Canfor's interpretation of Article
19 1901(3). Canfor has said repeatedly that the sole
20 function of Article 1901(3) is to prohibit the
21 imposition of obligations on a party to change or
22 modify or amend its antidumping or countervailing

1 duty law, that that is its sole purpose.

2 Canfor here has brought a claim under
3 Article 1105, and as we all know, a Chapter 11
4 Tribunal does not have the authority to order a
5 party to change or rescind its law. It may only
6 order monetary damages as a remedy.

7 So, under Canfor's theory, Canfor or any
8 private claimant could challenge the law itself,
9 could make a challenge to the actual statute, and
10 claim that the law, the statute itself, violates
11 Article 1105. If that were before a Chapter 11
12 Tribunal, and the Chapter 11 Tribunal agreed, it
13 would find that the state was liable, and it would
14 make an award of damages.

15 The result of that would not be the
16 imposition of an obligation on a party to change
17 its law. However, the clear result of that would
18 be an imposition on a party with respect to that
19 law. The obligation, obviously they are having to
20 pay monetary damages because that law was found to
21 have violated the NAFTA. There is no reading of
22 Article 1901(3) where one could find that an

1 obligation to pay monetary damages because your law
2 violated the NAFTA does not impose a requirement on
3 a party with respect to that law. And Canfor's
4 interpretation of Article 1901(3) falls for this
5 reason alone.

6 Now, yesterday Professor Howse seemed to
7 understand that the position that this put Canfor's
8 argument in, that this placed Canfor's argument at
9 somewhat--posed a problem for Canfor's argument.
10 Professor Howse opined that if the claim was before
11 a Chapter 11 Tribunal, if the claim was that the
12 law itself violated Chapter 11, Article 1901(3)
13 might have some effect in that case because Chapter
14 11, in fact, would be imposing an obligation with
15 respect to the law.

16 Now, in saying that, Canfor itself
17 admitted that 1901(3) cannot simply prevent the
18 imposition of an obligation on a party to change or
19 modify or amend its law. Their interpretation,
20 their own expert has, in essence, disavowed their
21 interpretation.

22 Now, I would just like to step back from

1 this a moment because yesterday Professor Weiler
2 asked Professor Howse a question. Professor Weiler
3 asked if a determination was found to have been
4 issued in accordance with U.S. law, it was found to
5 be entirely proper and, in fact, it was challenged
6 before a Chapter 19 Panel, and that panel found
7 that it was properly issued, and there was nothing
8 wrong with the Chapter 19 process, you said, well,
9 if a Chapter 11 Panel nevertheless found that that
10 law violated international law standards, wouldn't
11 this be imposing an obligation on a party, in
12 essence, to change its law?

13 And the practical effect might be that
14 even though the Chapter 11 Tribunal can't order a
15 party to change its law, the Chapter 11 Tribunal
16 would have issued a decision that the law violated
17 customary international law or international legal
18 obligations, and a state might feel that it had an
19 obligation to bring its law into compliance with
20 customary international law. So, the practical
21 effect might be that the state actually did change
22 its law.

1 But even if that was not the practical
2 effect and the effect was only that the state paid
3 damages, that still would be no less an imposition
4 on a party with respect to its antidumping law.

5 To step back even further, even if that
6 Chapter 11 Tribunal found in the end that there was
7 no liability, that no damage award should be made,
8 simply obligating the party to arbitrate that
9 dispute in an investor-state arbitration is
10 imposing an obligation on that party with respect
11 to that antidumping and countervailing duty law.

12 So, with that, I will end my remarks,
13 unless the Tribunal has further questions, and if
14 not, I would ask that it call upon my colleague,
15 Mark McNeill, to make some additional comments
16 regarding the NAFTA's context and object and
17 purpose.

18 PRESIDENT GAILLARD: We do have questions.
19 We do prefer to keep them for a later statement,
20 maybe at least when you're done with your oral
21 presentation. So, Mr. McNeill, you have the floor.

22 MR. MCNEILL: Good morning, Mr. President,

1 members of the Tribunal. I make some very brief
2 comments this morning about Article 1901(3)'s
3 context and the object and purpose of the NAFTA,
4 and my comments are in response to issues raised by
5 Canfor's counsel yesterday as well as some issues
6 raised by the Tribunal.

7 Specifically, I will address the issue of
8 double recovery, parallel proceedings, Article
9 1121, object and purpose, and effective dispute
10 resolution.

11 First, there was discussion yesterday
12 about the issue of the risk of double recovery
13 between this arbitration and the Chapter 19
14 proceedings which are ongoing, and Professor Weiler
15 raised the question of the remedies that are
16 available under Chapter 11 and Chapter 19.

17 Now, Canfor responded to the inquiry about
18 the potential for double recovery by giving an oral
19 covenant that if it obtained a refund of some or
20 all of its \$500 million or so of duties that it has
21 paid in the Chapter 19 proceeding, that it would,
22 quote, withdraw the claim, end quote. And the

1 reference to the transcript is at page 225, line
2 16.

3 With respect, Canfor misses the point.
4 The point is that Canfor is seeking recovery of the
5 same duties with interest in both proceedings. The
6 possibility that double recovery could ensue in
7 both fora is incompatible with the NAFTA's
8 objective of creating effective procedures for the
9 resolution of disputes. It is an additional
10 evidence as well suggesting the parties did not
11 intend or consent to subject themselves to the
12 burden of defending multiple actions with respect
13 to the same measures and face the potential of
14 double recovery.

15 Now, Canfor appears to concede the
16 possibility of double recovery, or it would not
17 have asked for the same refund in their two
18 proceedings. Similarly, Canfor would not have made
19 a promise yesterday to withdraw this claim in the
20 event that it obtained the relief it seeks in
21 Chapter 19.

22 Now, in terms of the remedies available

1 under Chapter 11 and 19, in Chapter 11 it is
2 undisputed that a tribunal can award damages. With
3 respect to Chapter 19, as Mr. Clodfelter explained
4 in his presentation on the facts yesterday,
5 binational panels are authorized to uphold
6 determinations or remand them, quote, for actions
7 not inconsistent with the panel's decision.

8 Now, Article 1904, paragraph 14,
9 subparagraph (a), expressly contemplates the
10 possibility that the effect of a binational panel's
11 ruling is the refund of duties. It provides that,
12 quote, Each party shall amend its statutes or
13 regulations to ensure that existing procedures
14 concerning the refund with interest of antidumping
15 or countervailing duties operate to give effect to
16 a final panel decision that a refund is due.

17 Now, in the administrative review, what is
18 called the assessment phase of a Chapter 19
19 proceeding, the effect of a Chapter 19 Panel
20 decision under existing municipal law, indeed, can
21 result in the refund of part or all of duties paid,
22 plus interest.

1 Now, ironically, yesterday, Canfor
2 referred to the Tribunal's decision in the
3 Occidental Exploration versus Ecuador case. The
4 transcript preference is page 227. In that case,
5 the Tribunal's solution to the problem of double
6 recovery was to enjoin the other proceedings to
7 avoid the risk of double recovery, the very
8 solution that the United States advocates here.

9 The Tribunal stated, and this is at page
10 73, paragraph 10, that, quote, In order to
11 forestall any possibility of double recovery, the
12 Tribunal directs the claimant to cease and desist
13 from any local court action, administrative
14 proceedings, or other actions seeking refund of
15 that paid, and holds that any and all such actions
16 and proceedings shall have no legal effect.

17 I will now turn to the issue of parallel
18 proceedings. Yesterday, Canfor discussed at length
19 the SGS versus Pakistan case and other similar
20 cases involving parallel claims under a BIT, and
21 before domestic courts. In reliance on those
22 cases, Canfor argues that the proceedings under

1 Chapter 19 do not deprive this Tribunal of
2 jurisdiction because the Chapter 19 proceedings
3 involved different causes of action and different
4 laws. Canfor's reliance on this line of cases is
5 misplaced.

6 First, Canfor's argument is backwards. It
7 assumes the very issue before this Tribunal, namely
8 whether there is jurisdiction under Chapter 11 to
9 begin with, and then it argues that jurisdiction
10 should not be divested by the fact that there are
11 ongoing proceedings under Chapter 19.

12 The issue here is entirely different from
13 the SGS case. The issue here is whether the
14 instrument under which Canfor asserts--invests the
15 Tribunal with jurisdiction to begin with, not
16 whether the jurisdiction is divested by an entirely
17 different instrument.

18 The United States has never contended that
19 this Tribunal lacks jurisdiction because of the
20 parallel proceedings under Chapter 19. Rather, in
21 our submissions we addressed the duplicative
22 proceedings in Chapter 19 as an issue of context.

1 We demonstrated the ordinary meaning of Article
2 1901(3) was consistent with the Treaty's object and
3 purpose of promoting effective dispute resolution.

4 And we demonstrated the parallel
5 proceedings by the same parties under the same
6 Treaty with respect to the same measures, seeking
7 the same damages was not consistent with that
8 objective.

9 I will now briefly address an issue raised
10 by Canfor concerning the waiver requirement under
11 Article 1121 of the NAFTA. Now, Canfor argued
12 yesterday that Article 1121 actually contemplates
13 duplicative proceedings under Chapters 11 and 19.
14 Article 1121 exempts from the waiver requirement,
15 quote, proceedings for injunctive, declaratory or
16 other extraordinary relief not involving the
17 payment of damages before an administrative
18 tribunal or a court under the law of the disputing
19 party.

20 Now, according to Canfor, the relief
21 available in Chapter 19 is akin to extraordinary
22 relief, not involving the payment of damages. In

1 its claims and under that chapter, therefore, fit
2 within the exception. This argument is without
3 merit. The exception to the waiver requirement
4 under Article 1121 does not apply to Chapter 19
5 proceedings. It applies, quote, to administrative
6 tribunals or courts. The Chapter 19 Panels are
7 neither administrative tribunals nor courts. Had
8 the parties intended to include Chapter 19
9 binational panels in that exception, Article 1121
10 would say so.

11 Moreover, since Canfor seeks the same
12 recover in Chapter 19 as it seeks here, reading the
13 binational panels to be within that exception would
14 be directly contrary to the very purpose of Article
15 1121 which, according to the Waste Management
16 Tribunal, was to avoid claims that present the risk
17 of double recovery.

18 I will turn now to the issue of object and
19 purpose. Yesterday, Canfor again accused the
20 United States of focusing narrowly on only one
21 object in the NAFTA, and the transcript reference
22 is at page 129 beginning on line five.

1 Canfor argues that all of the objectives
2 of the Treaty infuse all of the provisions of the
3 NAFTA, and the particular objectives cannot be
4 assigned to particular chapters or particular
5 provisions. And Canfor read to you a long list of
6 objectives in the preamble and in Article 102.

7 Canfor contends that these objectives
8 somehow support its interpretation of Article
9 1901(3), but the big question is left unanswered by
10 Canfor: How would allowing Canfor a second forum,
11 the wrong forum, to bring its claims promote the
12 Treaty's goal of free trade? It wouldn't.

13 Mr. Landry also made a point of reading
14 two of the objectives set forth in Chapter 19
15 itself. They are set forth in Article
16 1902(2)(d)(ii). Now, I would like to revisit that
17 provision because I think it informs the debate.

18 It provides that the object and purpose of
19 the agreement is to establish fair and predictable
20 conditions for the liberalization of trade, quote,
21 while maintaining effective and fair disciplines on
22 unfair trade practices, end quote.

1 Now, that part of the context, that part
2 of the object and purpose in Chapter 19 contradicts
3 Canfor's argument that the NAFTA parties consented
4 to submit antidumping and countervailing duty
5 claims to the investment chapter. It would
6 arguably compromise the ability of the NAFTA
7 parties to maintain effective disciplines on trade
8 if their antidumping and countervailing duty
9 determinations were subject to de novo review by
10 arbitration panels under Chapter 11. That is not
11 the standard that applies in domestic courts of the
12 parties, and it is not the standard that the
13 parties intended to have apply to their antidumping
14 and countervailing duty determinations in
15 subjecting those determinations to review under the
16 NAFTA.

17 Finally, I'll briefly address one issue
18 relating to the effective resolution of disputes.
19 We heard from Canfor's counsel more than once
20 yesterday that Chapter 19 Panels have--that Chapter
21 19 Panel proceedings have been ineffective and that
22 an effective resolution of Canfor's grievances

1 demand that it have access to Chapter 11.

2 Mr. Howse, Professor Howse, excuse me, if
3 I understood him correctly, intimated that Canfor
4 commenced this arbitration because it was not
5 confident that it could compel the refund of duties
6 that it seeks in Chapter 19. He stated, quote, We
7 just don't see that we have another remedy
8 available under the NAFTA, so we are here today
9 making a claim that is under Chapter 11. And the
10 transcript reference is page 230, lines six through
11 13.

12 Now, this is a post hoc interpretation of
13 Article 1901(3). Recounting subsequent events in
14 the Chapter 19 proceedings does not provide
15 evidence of what the parties intended in drafting
16 Article 1901(3). It is irrelevant to the
17 interpretive exercise before this Tribunal today.

18 Moreover, it is based on a faulty factual
19 premise; namely, that the Chapter 19 proceedings
20 have been ineffective. The Chapter 19 Panel issued
21 a--a Chapter 19 Panel issued a third remand to the
22 International Trade Commission in the material

1 injury proceeding on August 31, 2004.

2 Following the third remand, the
3 International Trade Commission issued what it
4 perceived to be the only determination consistent
5 with the panel's decision, which was a negative
6 threat finding. The Chapter 19 Panel's material
7 injury decision is now the subject of an
8 extraordinary challenge under Annex 1904(13) of the
9 NAFTA.

10 So, the proceedings in Chapter 19 are
11 ongoing, and they are now the subject of an
12 extraordinary challenge, and it's impossible to say
13 that those proceedings have been ineffective.

14 That concludes my remarks. I'm pleased to
15 take any questions from the Tribunal.

16 PRESIDENT GAILLARD: Thank you. Does that
17 conclude the presentation, the reply on the U.S.
18 side?

19 MR. CLODFELTER: Yes, it does,
20 Mr. President.

21 PRESIDENT GAILLARD: Thank you.
22 Mr. Landry and Mr. Mitchell, do you want to pause

1 for 10 minutes or something so that you can tell us
2 how you want to proceed, you want to answer, and
3 what kind of time frame have you in mind?

4 MR. LANDRY: Mr. President, I think what
5 we would like to do is take a break to--excuse me.

6 (Pause.)

7 MR. LANDRY: Mr. President, just, we would
8 like to take a break at a certain point in time to
9 basically just collect our thoughts in terms of the
10 way we would respond. Much of the presentation
11 made by the United States is effectively reargument
12 of what we talked about yesterday, so we will not
13 be taking a lengthy time, but we wanted to just
14 take a little bit of time to deal with some of
15 those, but we do have a bit of a timing problem
16 with Professor Howse. There are a couple of issues
17 that Professor Howse would like to respond to, and
18 instead of taking a break for that, we would prefer
19 that he now respond to those issues, if that
20 pleases the Tribunal.

21 PRESIDENT GAILLARD: It's really up to you
22 to organize who speaks, and you have certainly

1 equal opportunity for the surreply, so you can
2 certainly have Professor Howse start answer now,
3 and then we could have a 15-minute break, if that's
4 suitable, and then you can finish your argument.

5 For the record, we have questions, but
6 since you are may well answer some or start the
7 debate on some of the issues, I would rather wait
8 for your answer before we ask the questions we have
9 so that we can start the Q and A part of the
10 hearing.

11 MR. LANDRY: If I can just have one minute
12 to speak to Professor Howse, and then we will go
13 right into his response, and then we will take a 15
14 or 20 minute break, if that's--

15 PRESIDENT GAILLARD: Please do.

16 (Pause.)

17 PRESIDENT GAILLARD: So, we can go back to
18 the record.

19 Mr. Landry?

20 MR. LANDRY: Yes, Mr. President, Professor
21 Howse will respond to I believe three points that
22 were raised this morning in reply, and then we

1 would request a bit of a break before the balance
2 of the reply.

3 PRESIDENT GAILLARD: As agreed, yes.

4 SURREPLY STATEMENT BY THE CLAIMANT

5 PROFESSOR HOWSE: Mr. President, I believe
6 that on several points which have been raised this
7 morning by the United States, it appears that the
8 United States has misunderstood some of the
9 submissions or responses I made to this Tribunal
10 yesterday, and I would very, very quickly like to
11 return to those specific points that were made this
12 morning in connection to what I said yesterday.

13 First of all, I want to emphasize that
14 Canfor's claim is not that 1901(3) is meaningless
15 or that it doesn't have some application. As
16 Mr. Mitchell argued yesterday, it's an interpretive
17 provision. The word "construe" is there, and it
18 does impose an obligation on a Treaty interpreter
19 interpreting Chapter 11 just as it imposes an
20 obligation on a Treaty interpreter interpreting any
21 other chapter of NAFTA except 19; right?

22 So, the question is what of a situation

1 where the violation of the standards of Chapter 11
2 flowed inexorably or mandatorily from the law
3 itself as opposed to its administration? In that
4 case, I opined, since 1901(3) is an interpretive
5 provision, and we are not suggesting it's a nullity
6 by any means, in adjudicating the merits the
7 Tribunal might have to refer to 1901(3) if Canfor
8 were deemed to be making any claim that suggests
9 that it's the law itself within the meaning of
10 Chapter 19 that is contrary to the standards of
11 Chapter 11.

12 Now, my colleagues will explain the way in
13 which the Byrd Amendment is relevant here, and as
14 they'll explain and have alluded to already, and
15 I'm sure we will get into this in the questioning,
16 the argument of Canfor is not that the Byrd
17 Amendment is, per se, violative of the standards in
18 Chapter 11 simply as a piece of legislation on its
19 face. The Byrd Amendment is relevant because it is
20 part of the background to conduct surrounding the
21 initiation of this case and the nature of the
22 petition and the degree of industry support behind

1 it, but I think that has to be addressed when we
2 deal with the questions on the Byrd Amendment.

3 So, I simply want to make clear that our
4 claims are based upon the administration of the
5 law, not the law itself. On the merits, should the
6 Tribunal have concerns about 1901(3) as an
7 interpretive provision, then we will address those
8 concerns at length and show how our claims flow
9 from administration and not from the face of the
10 law. But what we are addressing in this proceeding
11 is the United States's motion, its submission that
12 1901(3) is a complete jurisdictional bar to any
13 claim under Chapter 11 of any kind, even one that
14 is a claim that arises out of conduct in the
15 administration of law as opposed to the law itself.

16 And a second point that I want to deal
17 with is the issue of effective remedy. I want to
18 make it clear that Canfor's claim is not based
19 simply on--nor can it be satisfied--by relief in
20 the form of refund of duties. That would be part
21 of it, but the claim relates to damages to Canfor's
22 investment that would not be fully made whole

1 simply by the return of duties. And again, that's
2 something that will be briefed and argued in detail
3 at the proper phase of the proceeding.

4 So, even if--even if somehow Chapter 19
5 provided an effective remedy for the return of
6 duties, it would still not provide reparations for
7 other damage that Canfor has suffered to its
8 business in the United States and consequence of
9 the conduct complained of.

10 The third point concerns the question of
11 whether a Chapter 19 binational panel is an
12 administrative tribunal or court for purposes of
13 the provisions in Chapter 11 that relate to
14 waivers. Again, we have raised these provisions as
15 part of an overall interpretation. We are not
16 pleading them in this case with respect to the
17 issue of the validity of the waiver because that
18 has been explicitly removed, as we understand it,
19 from the ambit of this proceeding. And clearly, to
20 the extent that the United States has reserved that
21 as an issue that it might plead on the merits, we
22 might have to get into it in more detail.

1 Very briefly, though, it is our view that
2 a Chapter 19 panel is an administrative tribunal or
3 court for purposes of this provision, and again, it
4 needs to be when the issue of the waiver is
5 actually argued, if it's argued by the United
6 States, we will brief it thoroughly. This relates
7 to certain considerations of municipal law,
8 including constitutional law where, if a situation
9 arose where a Chapter 19 Panel could not be
10 considered, for example, a court, there might be
11 serious constitutional issues, and at least the
12 U.S. municipal system as to the possibility of
13 enforcing a waiver because you would be in effect
14 waiving possibly any possibility of judicial
15 review.

16 But again, this relates to municipal law
17 issues, and if the substantive issue of the waiver
18 were before this proceeding, we would explain in
19 some detail the importance for purposes of this
20 provision of NAFTA a Chapter 19 binational panel
21 being deemed a court.

22 PRESIDENT GAILLARD: On this point,

1 Mr. Howse, you--and I confirm what I said at the
2 outset of this hearing, that we consider this issue
3 to be--not to be part of this stage, but since the
4 U.S. alluded to it, you may allude to it as well,
5 just for us to understand what's in the mind of the
6 parties, but we do not--we are not going to decide
7 on this at this stage.

8 But you are saying so it is possible you
9 may have a possible argument that the waiver would
10 be against the law in certain respects, so it would
11 not be doable. It would not be possible to waive
12 whatever rights you would have to waive to satisfy
13 the NAFTA requirements as to whether--or just in a
14 nutshell, could you elaborate a little bit on that.

15 PROFESSOR HOWSE: Mr. President, I have to
16 be careful here because I'm not an expert in U.S.
17 constitutional law, but I have followed the
18 constitutional issues in both Canadian and American
19 law that have arisen around certain provisions of
20 NAFTA, and constitutional issues arose and were
21 widely debated in the United States concerning the
22 feature of NAFTA that would replace domestic

1 judicial review with binational panel review, in
2 effect, as we've already heard, cutting off access
3 to the U.S. courts altogether in these matters.

4 And my understanding is that that, under
5 U.S. constitutional law, would have raised issues
6 about guarantees of review by a court that are
7 understood to be in the Constitution and not
8 subject to being taken away through this kind of
9 agreement.

10 But, however, if one were to view a
11 binational panel as having the character of a court
12 for purposes--for constitutional purposes, that
13 would be one way of dealing with the constitutional
14 issue, to say that what's meant by court in the
15 constitutional context goes to an independent
16 process which could include a tribunal of this
17 nature, but again, this will need to be considered
18 in some depth when and if the meaning of the waiver
19 issue is pleaded, and I really do not wish to be
20 taken to giving an expert judgment as to the issue
21 in U.S. constitutional law. Some of the greatest
22 U.S. constitutional scholars have, in fact, debated

1 this. I just want to signal that the possibility
2 of the use of the word "court" here may relate to
3 some municipal law issues.

4 PRESIDENT GAILLARD: Thank you, Professor
5 Howse. In fact, my question may be unfair because
6 at the same time I say that we are not going to
7 decide on this at this stage. It is not ripe. It
8 has not been briefed. So, I just wanted to get a
9 flavor for what you had in mind, but I don't think
10 we should pursue the debate on this particular
11 aspect. If we need to, and we will get there, we
12 will have--we will give the parties an opportunity
13 to fully express their views, but now that I have
14 engaged into that debate a little too much, now
15 maybe the other side would like to say a word, but
16 frankly be short because I don't think it's
17 relevant, just for the curiosity of the Tribunal,
18 so it's not--I confirm for the record that we are
19 not going to decide that at this stage as agreed by
20 the parties earlier. So, it's only for my
21 curiosity, I would say, that I ask the question,
22 and to know what's coming up.

1 Ms. Menaker, if you want to say a word on
2 this.

3 MS. MENAKER: May I just as a point of
4 clarification.

5 PRESIDENT GAILLARD: Clarification, I
6 don't take that as expert testimony or anything
7 like that. It was a personal view, and I don't
8 think we should really make more of it.

9 MR. LANDRY: Mr. President, hopefully that
10 maybe that we can stop the debate by this. It is
11 not before the Tribunal, as Mr. President has said.
12 Take it as a given that if this matter is briefed,
13 the interpretation of that provision within the
14 agreement by Canfor will be that, indeed, the
15 binational panel is an administrative Tribunal or
16 court as 1121 envisages it. That will have to be
17 briefed, obviously. It sounds like the U.S. is
18 taking the position. It has not, but that's not
19 before us.

20 PRESIDENT GAILLARD: That is clear to me.
21 I understand your position, and I also confirm that
22 this is not ripe for determination at this stage.

1 Ms. Menaker.

2 MS. MENAKER: I would like to remark
3 because our understanding does not comport with
4 that. Our understanding of the agreement between
5 the parties and with the Tribunal is that we are
6 not asking this Tribunal to dismiss this claim on
7 the basis of Article 1121. We have not made a
8 jurisdictional objection on the grounds of Article
9 1121 at this time.

10 We have, however, argued that the context
11 of the NAFTA demonstrates that the parties did not
12 anticipate parallel proceedings going on under
13 Chapter 11 and Chapter 19, and that issue was fully
14 briefed. We pointed to Article 1121 in this
15 context, and we argued that contrary to Canfor's
16 argument, it said that in the context of Chapter
17 11, including Article 1121, showed that the parties
18 did envision such duplicative proceedings. In our
19 written submissions we responded and said that is
20 not the case, and we pointed out this precise fact
21 and said that the proceedings that Canfor has taken
22 part in Chapter 19 does not fall within the

1 exception in Article 1121, and therefore, as part
2 of the context of the Treaty, you should see that
3 the parties did not envision these parallel
4 proceedings.

5 So, that issue, we submit, is, indeed,
6 before the Tribunal, so we just want the position
7 to be clear that we are not asking for dismissal on
8 the basis of Article 21, but we are asking you to
9 take into account the correct interpretation in
10 Article 21 insofar as it supports, we contend, our
11 submission that the parties did not envision
12 duplicative proceedings of this nature.

13 PRESIDENT GAILLARD: Thank you for this
14 clarification. That is also my understanding, so I
15 think what you just stated is perfectly correct.
16 But that being said, I don't think we need to
17 belabor the point.

18 We have a question regarding the
19 organization of the hearing. Is Professor Howse
20 still available for a little while? Because if we
21 have questions from the Tribunal which relate to
22 points which he addressed, are you comfortable--we

1 don't want to prejudice Canfor's position in any
2 manner, so are you comfortable if we ask the
3 questions now, or do you still want the break and
4 when we ask the questions afterwards, some of which
5 may have to do with matters which were addressed by
6 Professor Howse?

7 MR. LANDRY: Mr. Howse says approximately
8 15 minutes, I'm informed, and for the record,
9 Mr. President, as we indicated yesterday, Mr. Howse
10 is available tomorrow, and I understand the
11 proposition is that if there are questions that
12 come that require Professor Howse's response, that
13 you will accommodate that tomorrow. So, he has 15
14 minutes now. If there are some specific questions,
15 he is more than willing to answer it.

16 PRESIDENT GAILLARD: So maybe we should
17 start now. Make use of the 15 minutes. No break
18 for the time being. We may have a few questions,
19 and we will start with those which have to do with,
20 although it's hard to segregate, but points which
21 were addressed by Professor Howse, and then we will
22 see what to do afterwards. We may have a break

1 afterwards, and then you can wrap up the rest of
2 your rebuttal.

3 So we'll start with the questions now.

4 Mr. Harper has a question to start with.

5 ARBITRATOR HARPER: Thank you,
6 Mr. President.

7 Professor Howse, I wanted to explore two
8 areas with you briefly, if I may. The first, and I
9 just to want make sure I understand what you said a
10 few minutes ago. The first has to do with the Byrd
11 Amendment. Is it Canfor's position that it is not
12 challenging the Byrd Amendment in this proceeding
13 as a statute?

14 PROFESSOR HOWSE: The pleadings on the
15 Byrd Amendment, I believe, will be discussed and
16 responded to by Mr. Landry; is that correct,
17 Mr. Landry? Or would you like me to say something
18 about those pleadings myself?

19 ARBITRATOR HARPER: I'm just talking about
20 what you said.

21 PROFESSOR HOWSE: Right. In other words,
22 why the Byrd Amendment is there, and what is the

1 significance of mentioning the statute in a claim
2 that is in essence is about conduct and not
3 challenging the statute as such? I understand the
4 question. It's a matter of who best on the team
5 would be--who would be best placed to take you
6 through the exact nature of our submissions on the
7 Byrd Amendment in the frame of my remarks.

8 MR. LANDRY: Let me just go back to your
9 question, Mr. Harper.

10 PROFESSOR HOWSE: Well, perhaps since we
11 have the 15--do you mind, Mr. Harper, if we get
12 other questions, and then if Mr. Landry responds to
13 your question on the Byrd Amendment?

14 ARBITRATOR HARPER: I'm comfortable with
15 whatever the position is of Canfor. I'm just
16 trying to find out what it is.

17 PRESIDENT GAILLARD: I guess it's for lead
18 counsel to make a position as to what the request
19 is, and I think it's clear in writing, and we have
20 a few clarification questions, but we don't want to
21 engage into this debate among counsel before this
22 Tribunal.

1 MR. LANDRY: Mr. Harper, and I will get
2 the specific references. We have dealt with the
3 issue of the Byrd Amendment in our written
4 material, but let me just say this: We do not, and
5 I think it--I hope it was made clear yesterday, we
6 are not challenging the Byrd Amendment from the
7 perspective of whether or not it is--it is
8 domestically a violation of the domestic law. The
9 question is the Byrd Amendment and the way that
10 Professor Howse has talked about the effect that
11 the Byrd Amendment had on the conduct of officials
12 in initiating the investigation originally at this
13 point in time is the key aspect of the claim at
14 this point. The pleadings obviously speak for
15 themselves, but I will get you more direct
16 references to the written material at a later
17 point. But I think for the purposes of your
18 question now, I think hopefully that will answer
19 your question.

20 ARBITRATOR HARPER: I had one other
21 matter, if I may, Mr. President.

22 PRESIDENT GAILLARD: Yes, you may.

1 ARBITRATOR HARPER: Professor Howse, and I
2 just want to be sure I understand your position and
3 by inference the position of Canfor. I understood
4 you to have said earlier this morning that Canfor's
5 allegations are based on claims on the
6 administration of the law and not the law itself.
7 I'm not sure what the antecedent of the law itself
8 was at this point, whether it was the Byrd
9 Amendment or whether it was other law that is
10 deemed to be antidumping and countervailing duty,
11 but I want to find out from you, if I may, the
12 distinction you drew. That is to say, that
13 Canfor's claims are based upon the administration
14 of the law and not law itself. What did you mean?

15 PROFESSOR HOWSE: Well, very simply that
16 the conduct that we have presented in our Statement
17 of Claim as allegedly violating the standards of
18 treatment in Chapter 11 of NAFTA is not conduct
19 that is mandated or is not the statute itself.
20 It's rather decisions of a discretionary nature
21 taken by officials in the application or
22 administration of the laws.

1 ARBITRATOR HARPER: And in that
2 administration of the law, do you have in mind that
3 such administration constitutes administrative
4 practice?

5 PROFESSOR HOWSE: Well, the individual
6 decisions of officials taken as a whole and viewed
7 as law to be applied in some future case could
8 constitute administrative practice, depending upon
9 the way in which those decisions are binding or
10 have legal weight in a future proceeding.

11 But Canfor's claim, which is based on the
12 words of 1901(3), in their context, in other words,
13 in the context of Articles 1901 through 1904
14 particularly is that what 1901 addresses is
15 obligations that would involve doing something or
16 not doing something with respect to the substance
17 of the law. Our complaint is based on conduct, and
18 if officials were to conduct themselves in
19 other--in another proceeding entirely properly,
20 then under Chapter 11--I mean, there would be no
21 need to alter the law as it's written in order to
22 ensure that in the future this doesn't happen.

1 And this relates to a more general point.
2 We are not challenging the U.S. CVD/AD system. We
3 are not saying that Chapter 19 Panels are never
4 effective. This is a very special case. The
5 history of what happened under Chapter 19 in this
6 case and the history of what has happened to the
7 investor under the decisions and actions of U.S.
8 officials is extraordinary, and we will prove that.

9 And so, the basic distinction is that
10 1901(3) does not prevent, jurisdictionally prevent
11 a challenge that is based upon the discretionary
12 conduct of officials in administration of the law.
13 What effect it would have if we were challenging
14 the law itself in saying that therefore implicitly
15 Canfor is under some obligation that stems from
16 something being wrong with its law as it's written,
17 including the whole body of judicial precedents or
18 administrative precedents if they have some binding
19 precedential effect, that's the distinction we are
20 drawing.

21 PRESIDENT GAILLARD: Thank you.

22 Professor Weiler.

1 ARBITRATOR WEILER: Professor Howse, I
2 thought that the argument made yesterday might have
3 been of potential consequence; namely, that Chapter
4 11 itself in 2021 contemplated parallel
5 proceedings, and I thought I understood correctly
6 what Mr. McNeill was arguing this morning, that
7 Chapter 19 proceedings were not the kind of
8 extraordinary relief that was mentioned in the
9 waiver provision of Chapter 11. Not that Chapter
10 19 wasn't a court, but that the kind of relief
11 sought in Chapter 19 proceedings were not the kind
12 of extraordinary relief that was contemplated by
13 this parallel thing, and I'm just not sure that you
14 actually answered that point directly. And even if
15 that's not what they said, then take it as a
16 question from me.

17 PROFESSOR HOWSE: No, in fact, Professor
18 Weiler I didn't address that point, and I will
19 address it directly now. I just need to find that
20 provision in the NAFTA and take you through the
21 exact wording of the provision.

22 PRESIDENT GAILLARD: 1121.

1 PROFESSOR HOWSE: Yes, I know the number.

2 So, the language here is except for
3 proceedings for injunctive, declaratory, or other
4 extraordinary relief not involving the payment of
5 damages, and it is our view that this expression
6 needs to be read as a whole. In other words, the
7 proceedings that are not exempted are proceedings
8 for injunctive, declaratory, or other extraordinary
9 relief not involving the payment of damages.

10 And the language "other extraordinary
11 relief" suggests that the contrast is between
12 actions for damages on the one hand, and actions
13 for other kinds of relief which can include
14 declarations, can include injunctions, or could
15 include other kinds of comparable relief that is
16 extraordinary in the sense that the relief is not
17 in the form of damages.

18 ARBITRATOR WEILER: Could I ask you a
19 second question with the President's permission?

20 PRESIDENT GAILLARD: Of course.

21 ARBITRATOR WEILER: I found also
22 potentially of consequence the following argument I

1 understood Ms. Menaker to make. And again if she
2 did not make it quite in that way, then please take
3 it as a question from me. She says, if I
4 understood correctly, even if it's true that there
5 might be conduct--there might be decisions or
6 determinations or administrative actions which are
7 not mandated by antidumping law, that the
8 obligation of a member such as United States,
9 Canada, or Mexico to appear before a tribunal under
10 Chapter 11 would be an obligation in respect to
11 that law. Even if the complaint concerned a
12 determination, I don't think she concedes that
13 point, but I think she was telling this Tribunal,
14 even if you accept the distinction that Canfor
15 seems to be making that there is a difference,
16 antidumping law means normative stuff and
17 individual determination, et cetera, is not
18 covered. The obligation to come and litigate that
19 would be an obligation in respect to antidumping
20 law. And I think that might be an argument of some
21 consequence, and I wonder if you wanted now to say
22 something about that.

1 PROFESSOR HOWSE: Professor Weiler, I will
2 be very brief, and my colleagues will address this,
3 because I have to leave, but very briefly, the
4 language in 1901(3) obligation with respect to AD
5 and CVD law in our submission has to be read in the
6 context of what Chapter 19 says about a party's
7 rights and obligations with respect to its AD and
8 CVD law, and those obligations have been discussed,
9 and they relate to the extent to which you can
10 retain the law, and the extent to which and under
11 what conditions you can amend it.

12 So, our interpretation is contextual, and
13 so we don't think it has anything to do with
14 whether you can oblige a NAFTA party to litigate,
15 and that relates to a consideration we've raised
16 several times which is that where the NAFTA parties
17 wanted to ensure that they were not under an
18 obligation to litigate in certain dispute
19 settlement processes, they used language that went
20 to the exclusion of forum or the exclusion of the
21 chapter under which that dispute settlement process
22 would be found.

1 MS. MENAKER: Mr. President, I wanted to
2 ask the Tribunal if I might have a chance to
3 respond very briefly to Mr. Howse's latest remark.

4 PRESIDENT GAILLARD: Yes. Mr. House is
5 excused because I see that he has to go.

6 MR. LANDRY: Mr. President, given the
7 question was direct and directed, we do have just a
8 minor addition to it that Mr. Mitchell would like
9 to say before Ms. Menaker.

10 MR. MITCHELL: We will do it after the
11 break. Okay.

12 MR. LANDRY: We will do it after the
13 break, okay.

14 PRESIDENT GAILLARD: Ms. Menaker, you may
15 answer now, if you prefer. Or do you want to wait
16 for the elaboration on the argument before you
17 make--before you answer it? Either way.

18 MS. MENAKER: I think if they have more to
19 say in regard to an answer, I might as well wait
20 for their full answer before responding.

21 PRESIDENT GAILLARD: That's probably best.
22 Thank you.

1 So, now we will have a 15-minute break, so
2 you can collect your thoughts and present an
3 answer, and then we would have the questions and
4 answers proceed. We are adjourned for 15 minutes.

5 (Brief recess.)

6 PRESIDENT GAILLARD: We resume the
7 hearing. We will now hear from Canfor's side some
8 rebuttal.

9 MR. LANDRY: Thank you, Mr. President. I
10 have a couple of quick points that I would like to
11 make in response to comments made by Mr. McNeill,
12 and then my friend Mr. Mitchell, my colleague,
13 Mr. Mitchell, will deal with some substantive
14 points that were raised in the other parts of the
15 argument, if that's okay with the Tribunal.

16 PRESIDENT GAILLARD: Certainly. Please go
17 ahead.

18 MR. LANDRY: Again, without trying to
19 repeat word for word what Mr. McNeill said in
20 trying to get the context within the point, he was
21 dealing with the issue at the end of his
22 submissions regarding whether or not we are at a

1 point to determine if the Chapter 19 Panel process
2 has been effective dispute resolution.

3 I would like to make Canfor's position
4 fairly clear on this point. Whether or not the
5 extraordinary challenge that is happening in
6 respect of the ITC Chapter 19 Panel decision is
7 successful, Canfor's submission is the approach
8 taken by the U.S. in this case, specifically the
9 ITC to respond to, has been nothing short of
10 extraordinary. You only have to take a look at the
11 decisions by the Chapter 19 Panel and the remand
12 decisions by the ITC to understand why I use such a
13 word as extraordinary because the ITC and, quite
14 frankly, the DOC in their remand decisions have in
15 my submission improperly and inappropriately
16 ignored the clear directions of the chapter panel,
17 the Chapter 19 Panel decisions.

18 Now, what happens as a result of that?
19 The result of that is it effectively calls into
20 question the effectiveness of the Chapter 19
21 procedure, per se. We are dealing with at least
22 three times that it went back to the ITC, and

1 Mr. Mitchell said that the ITC then eventually put
2 in a decision consistent with the ruling of the
3 Chapter 19 Panel. To say they put it in grudgingly
4 is an understatement. That type of an attitude,
5 that type of an approach, if you look at it from
6 Canfor's perspective, is just a totally ineffective
7 remedy, and it will not at any point in time under
8 the Chapter 19 Panel process provide an effective
9 remedy for the injuries that have been suffered by
10 Canfor's operations in the United States up to the
11 time when we finally get a result, even assuming
12 it's successful, assuming that the extraordinary
13 challenge claim is unsuccessful. There will not be
14 an effective remedy to offset the serious injury
15 that has been suffered by Canfor.

16 So, therefore, in our submission, the
17 approach that both the ITC and the DOC have taken
18 in respect of the Chapter 19 Panel process shows
19 patently that both of those agencies, in our
20 submission, are just wantonly disregarding clear
21 directions by the Chapter 19 Panels, thereby
22 putting the Chapter 19 Panel process in significant

1 doubt, if one looks at it from the point of view of
2 an effective dispute resolution mechanism.

3 The second point, Mr. President, that I
4 would like to deal with is the concept of double
5 recovery, to make it very clear. Firstly, as
6 Professor Howse said this morning, duties are one
7 issue in the damage claim. There is a significant
8 other damage that will be alleged--

9 PRESIDENT GAILLARD: On this one, you
10 confirm that it's Canfor's position that the return
11 of the duties is part of the damages you seek on
12 the merits pursuant to Chapter 11? You said in
13 essence it's part of it, it's not everything, there
14 is more than that, there is additional damages and
15 so on, but you confirm that it is part of it?

16 MR. LANDRY: Yes.

17 PRESIDENT GAILLARD: Thank you.

18 MR. LANDRY: But here is the issue, and
19 again, it somewhat relates to the 1121 argument and
20 somewhat relates to the debate that we had
21 yesterday on double recovery. There is no
22 jurisdiction in the Chapter 19 Panel to order a

1 refund of the duties. The only jurisdiction that's
2 in the Chapter 19 Panel is to either affirm or
3 remand, to ask--effectively ask the decision maker
4 to make a decision not inconsistent with its
5 decision. It cannot order refund. It cannot order
6 any monetary award. If any monetary award is going
7 to come out of the Chapter 19 process, it will be
8 as a result of, in my submission, it will be as a
9 result of a determination that's made by a Chapter
10 19 Panel which effectively vacates something.
11 Let's assume for the moment the order. Which means
12 that the duties have been collected illegally, and
13 it will be the DOC who holds these duties, who will
14 be the one that will ultimately refund not the
15 Chapter 19 process--sorry, the Chapter 19 Panel
16 because it doesn't have jurisdiction to do that.
17 And I think you will recall Professor Howse dealing
18 with that issue.

19 Now, to add one little layer to that,
20 having said that, and therefore in our submission
21 that clearly makes a differentiation between the
22 claim for damages that are being made here and the

1 claim for extraordinary relief in effect in the way
2 of a declaratory judgment from the panel in a
3 Chapter 19 process, if there is an additional
4 element which may result somehow, whether it's
5 because of the ITC, DOC determinations themselves,
6 not the Chapter 19 Panels who can't do this. If
7 there is such a possibility that there might be
8 double recovery, that is where Occidental kicks in,
9 and the position that we are taking.

10 But we are clear from our perspective that
11 the Chapter 19 Panel process does not--that Chapter
12 19 Panels do not have the ability to do anything
13 but affirm the remand.

14 PRESIDENT GAILLARD: Thank you. I think
15 we understand the argument.

16 MR. LANDRY: Mr. President, Mr. Mitchell
17 will do the balance of the surreply.

18 PRESIDENT GAILLARD: Mr. Mitchell, please
19 proceed.

20 MR. MITCHELL: Thank you, Mr. President.
21 I can be very brief as it is not our intention to
22 revisit matters previously covered.

1 I think I have five points. The first has
2 been averted to in various different ways, and we
3 started yesterday morning with a discussion of what
4 the issue was before this Tribunal, and then in
5 various contexts we have strayed into discussions
6 about things that we submit are simply actually not
7 before the Tribunal today. I understand the
8 discussion we had on Article 1121 just before the
9 break, but I think it goes beyond that.

10 And you heard this morning, and indeed, on
11 the first day you heard from I believe it was
12 Mr. Bettauer, there was a discussion about whether
13 these were investment measures, and then this
14 morning this was revisited by Mr. Clodfelter.
15 Whether what is an issue in the Statement of Claim
16 and the memorials are measures relating to
17 investment as that term is understood in Article
18 1101 is simply not before the Tribunal on this
19 motion. That's a matter that was expressly
20 reserved to be argued later. It's not before the
21 Tribunal.

22 The sole issue on this motion is whether

1 what Canfor complains of, namely arbitrary,
2 politically motivated, egregious conduct which this
3 Tribunal must assume has occurred, is whether that
4 conduct cannot be the subject of a Chapter 11 claim
5 simply because it touches in some way on the AD or
6 CVD regimes and therefore is excluded by 1901(3).
7 That is the simple issue for this Tribunal. And
8 again on the point you have to assume that the
9 facts are true, I simply refer you to the Methanex
10 decision on jurisdiction and admissibility, which
11 is in our material, where it makes clear at, I
12 believe, paragraph 112, paragraph 50 of the
13 decision the Tribunal is bound to accept the facts
14 as true.

15 The second point that I want to make
16 relates to something Mr. Clodfelter said this
17 morning, and this was in response to the
18 President's question with respect to labeling: And
19 Mr. Clodfelter this morning--and I don't want to
20 misquote him, but the tenor of his response was
21 that the United States concedes that a party may
22 not avoid Chapter 11 responsibility simply by

1 labeling a matter as AD or CVD law. And the
2 Tribunal is free to look to see if, in fact, the
3 evidence that the parties present demonstrates that
4 that is a proper characterization of it.

5 Well, it's our submission that the
6 Tribunal cannot answer that question in the
7 abstract. Here, there is a plea on the face of the
8 pleadings that the regime is being administered in
9 a politically motivated, predetermined way,
10 arbitrarily and abusively with the harm to intent
11 investors such as Canfor. The Tribunal cannot
12 simply determine on this application that the
13 conduct of which we complain is properly labeled AD
14 or CVD conduct. Indeed, it's our submission that
15 at the minimum what Mr. Clodfelter has conceded is
16 that this matter has to be addressed at the merits.

17 GERE Third, Mr. Clodfelter raised some
18 issues concerning, and I believe that this is again
19 back to the President's question from yesterday,
20 whether Canfor's claim is tied solely to the
21 Statement of Claim, and then he made some comments
22 concerning the strictures in respect of

1 international claims as opposed to commercial
2 claims, and submitted that the conduct--the
3 Tribunal would only have jurisdiction with respect
4 to measures specifically articulated in the
5 pleadings. I have several responses.

6 The first is that this simply is not an
7 issue in this motion. Our plea is sufficiently
8 made, whether it is confined to the Statement of
9 Claim with the memorials being considered as
10 evidence in support of the intent Canfor has
11 pleaded, or whether the entirety of the conduct
12 alleged in the pleadings is viewed as the substance
13 of the claim, but again, that is not this motion.
14 For clarity, Canfor intends to rely upon all of the
15 United States's conduct up to the date of the
16 hearings on the merits as the basis for its claim.

17 Second, if the allegation being made by
18 Mr. Clodfelter this morning is intended to be some
19 sort of allegation that there is some inadequacy in
20 Canfor's pleading, again, that is not this motion,
21 and it would fail in any event.

22 This arbitration is brought under the

1 provisions of the UNCITRAL Rules. The UNCITRAL
2 Rules set out the manner in which a case is
3 articulated before a tribunal. It starts with a
4 Statement of Claim which has certain minimum
5 standards of pleading. The requirement of the
6 UNCITRAL Rules is Article 18(2). And it is
7 elaborated during the course of the proceeding by
8 subsequent statements and subsequent documents and
9 evidence provided to the Tribunal.

10 The UPS case, which we have heard in our
11 submission far too much about given its relevance
12 to this proceeding, did deal with the issue of
13 adequacy of pleading, but it was in response to a
14 specific motion alleging that there was some
15 inadequacy of pleading. And just for your
16 reference, the document is, in fact, in the
17 claimant's book of authorities on the rejoinder at
18 Tab 10, and the discussion of the UNCITRAL
19 requirements of pleading starts at paragraph 123
20 and following on page 38.

21 But it describes quite clearly that one
22 does not plead every allegation of fact, one does

1 not plead their evidence, one does not plead their
2 law.

3 The third response in respect to this,
4 these comments made by Mr. Clodfelter concerning
5 the scope of Canfor's claim, is that we are dealing
6 with events subsequent to the claim, things like
7 the treatment of the ITC and the various conduct
8 that has occurred after the pleading. And
9 Mr. Clodfelter made the observation that you have
10 to have a claim in respect of the specific
11 measures, and the NAFTA is quite clear on that.

12 In making that submission, Mr. Clodfelter
13 is ignoring the fact that a previous NAFTA Chapter
14 11 Tribunal has specifically dealt with that very
15 question, and the reference--and I'm sorry I didn't
16 anticipate this point coming up--the reference for
17 the Tribunal is the Pope and Talbot arbitration,
18 and there was a specific motion, and it's available
19 on just about everybody's Web site. The motion was
20 the award concerning the motion by the Government
21 of Canada respecting the claim based upon the
22 imposition of the super fee. And just for

1 reference, the date of the Tribunal's ruling was
2 August 7th of 2000.

3 And to put this case into context, what
4 was at issue in the Pope and Talbot case was the
5 administration of the softwood lumber regime in
6 Canada in respect to a claim brought by an American
7 company, Pope and Talbot, alleging that the claim
8 had been or that Pope and Talbot had been treated
9 in either a discriminatory way or in a way that
10 violated the minimum standard, and the ultimate
11 holding was the 1102 claim was dismissed, but on
12 certain grounds the 1105 claim was allowed.

13 In the course of that proceeding,
14 subsequent to the claim being brought, Canada
15 enacted a device known as the super fee, and this
16 was an additional export tax--export fee imposed
17 upon lumber companies' exports from Canada to the
18 United States beyond a certain value, and the
19 argument was that this was discriminatory impacted
20 upon Pope and Talbot, the American investor. That
21 fee was imposed two years after the arbitration was
22 launched.

1 Canada argued that because the fee was
2 not, and could not have been, specifically
3 mentioned in the Statement of Claim, it couldn't be
4 considered by the Tribunal, and the paragraphs that
5 I would ask you to reference in the Tribunal's
6 decisions are paragraphs 22 through 25, and I will
7 just read for you paragraphs 24 and 25. After
8 setting up the background, they say (reading):
9 Based upon any fair reading of the claim, it is
10 patent that the investor was challenging the
11 implementation of the Softwood Lumber Agreement as
12 it affected its rights under Chapter 11 of the
13 NAFTA and that as the regime changed from year to
14 year, those effects might also change. In other
15 words, the claim asks the Tribunal to consider the
16 regime not as a static program, but as it evolved
17 over the years.

18 And then the Tribunal goes on, "For these
19 reasons, the Tribunal concludes that the investors'
20 contentions regarding the super fee are not a new
21 claim, but relate, instead, to a new element that
22 has recently been grafted on to the overall regime.

1 In this respect, the super fee is akin to the
2 various changes in allocation methodology, use of
3 discretionary quotas and the like that have marked
4 the regime since its inception."

5 And so, if you look at the investor's
6 Statement of Claim, and this is simply by way of
7 example, the paragraphs 107 to 109, for instance,
8 make the point that the Government of the United
9 States has for over 20 years engaged in an ongoing
10 course of conduct with the objects we allege, of
11 causing harm to companies that are investors with
12 investments such as Canfor, and it goes on to
13 relate the United States continuing changes,
14 modifications, otherwise interpretation, improper
15 interpretations of its law causing significant
16 economic harm to those in the position of Canfor,
17 and describes the latest of the ongoing actions.

18 So it's clear from the Statement of Claim
19 that what Canfor is contending relates to the
20 ongoing pattern of conduct of the United States.

21 Ms. Menaker made some submissions
22 regarding administrative practice. We stand on the

1 submissions made previously, and I'm not going to
2 elaborate upon them here.

3 With respect to the UPS case, Ms. Menaker
4 again referred to various of the submissions. I
5 would simply refer you to the United States's reply
6 on jurisdiction, the authorities at Tab 10 pages
7 156 and 157, where the counsel for Canada says to
8 the Tribunal--this is an extract from the
9 transcript--it says: "Before I begin, I understand
10 that my friends have agreed to drop the allegations
11 regarding Canada's failure to enforce its goods and
12 services tax, so perhaps Mr. Carroll can confirm
13 this for the record." Mr. Carroll, who was lead
14 counsel, said: "That's almost right but not quite.
15 We are abandoning our claims with respect to goods
16 and services taxes only insofar as they relate to
17 paragraph--to Article 1105 of NAFTA." And that's
18 the extent of the argument.

19 And in my submission, whether someone
20 abandons an argument about a different provision in
21 a different case provides no indication of the
22 strength of the argument, particularly when the

1 argument is based upon a differently worded
2 provision, one that uses the word measure.

3 And lastly, in my reply, I just want to
4 elaborate on what Professor Howse was saying in
5 response to Professor Weiler's last inquiry about
6 whether participation in an arbitration is an
7 obligation with respect to the law. And I
8 translate that to a question whether a consequence
9 imposed upon a party, i.e., the participation in
10 the arbitration--because they engaged in arbitrary
11 and abusive treatment of an investor in a matter
12 that is connected with the AD or CVD field, is what
13 is meant by an obligation imposed upon a party with
14 respect to their law.

15 And it's our submission that the mere fact
16 that there is a consequence by virtue of how the
17 party has administered their AVD (sic) laws, indeed
18 the measures that they have carried out, and again,
19 I note that the provision doesn't use the word
20 measures, it uses the word law, but simply imposing
21 a consequence upon the party by virtue of the
22 abusive use and the abusive discretion that's

1 granted to the United States officials under their
2 law is not the imposition of an obligation with
3 respect to that law. It is outside of that field.

4 So, those are the submissions of Canfor in
5 reply, and now we look forward to the Tribunal's
6 questions.

7 PRESIDENT GAILLARD: Thank you,
8 Mr. Mitchell. You may want to stay where you are
9 because we may have the questions in reverse order.
10 Since it's fresh in our minds, we may start with
11 you, and we have a few clarification questions, and
12 then we will get to earlier points, if you agree to
13 that.

14 And I see that we still have time. We
15 plan to have a lunch break at one, if it's
16 convenient to everybody, just for planning
17 purposes, and we have time to start certainly the
18 question and answer aspect.

19 If we go back, I have two questions for
20 you. One has to do with your very last comment
21 where you were answering an argument made in
22 particular by Ms. Menaker, but it's in the

1 pleadings generally as to the fact that--they say
2 in substance that the obligation that the
3 obligation to arbitrate pursuant to Chapter 11
4 Section B is an obligation within the meaning of
5 1901(3) in and of itself.

6 So, I would like to understand better your
7 answer to that because you said it's a consequence,
8 but I think their point is a point of mere
9 interpretation of NAFTA, if I may. Since the
10 obligation to arbitrate is an obligation with
11 respect to within the meaning of 1901(3), it has
12 been the intention of the NAFTA drafters to exclude
13 any arbitration which has to do with matters with
14 respect to, quote-unquote, countervailing duty law
15 and antidumping law.

16 What do you have to answer to that? I
17 don't quite understand your argument as the
18 consequence. So maybe you want to pause on that.

19 It goes for every question I'm going to
20 ask, we are going to ask. You may choose to pass
21 and to come back at a later stage. Some questions
22 will be more difficult than others. I'm not

1 suggesting that this one is particularly difficult
2 for you, but for any question going forward you may
3 answer immediately or you may answer at a later
4 stage during the course of the day or possibly
5 tomorrow. We will see tonight if we need a hearing
6 tomorrow morning as well.

7 MR. MITCHELL: Let me try and start with a
8 response. I have urged upon the panel an
9 interpretive approach that starts from the Vienna
10 Convention, looks at what we say the plain meaning
11 is, looks at the immediate context in 1901 and 1902
12 and 1904, and looks at the surrounding context of
13 the different drafting of other provisions. And we
14 argue from that that the word--the phrase
15 "obligations with respect to CVD law" takes its
16 plain meaning from or its ordinary meaning from
17 examining all of those factors.

18 The United States seems to say that any
19 time we have to do anything that touches upon in
20 respect of anything or relating to anything that
21 touches upon our AD or CVD regime--and I use the
22 word "regime" as opposed to "law"--that's an

1 obligation with respect to our law. And it's our
2 submission that simply a consequence being imposed
3 upon you because you've abusively used your regime
4 is not an obligation with respect to the regime or
5 the law which is the specifically defined term that
6 you are allowed to maintain under Article 19,
7 Chapter 19.

8 I don't know that I can take it much
9 further than that.

10 PRESIDENT GAILLARD: And you include in
11 the consequences the obligation to arbitrate
12 because it's a consequence of what you characterize
13 as the abusive conduct; is that correct?

14 MR. MITCHELL: The obligation to arbitrate
15 is a consequence of Canfor having brought a Chapter
16 11 arbitration. The United States would say that
17 is the consequence that is imposed upon them by
18 virtue of us having done so, and that is the
19 consequence that is with respect to their law.

20 PRESIDENT GAILLARD: Okay. Can I ask you
21 another question. It has to do with the update of
22 the Statement of Claims. You make two points. One

1 is that we can view it in two different ways. We
2 can see that if we are narrow in our interpretation
3 of what is admissible before us, we take the Notice
4 of Arbitration and Statement of Claim, and the rest
5 is only proof of those facts stated in
6 there--that's a narrow interpretation--and then you
7 say you could also have a broader interpretation
8 which is to follow the Pope and Talbot case law.
9 When it's a continuation of the same course of
10 conduct, you're not barred to judge more of the
11 same thing, if I may put it in a colloquial way;
12 right?

13 MR. MITCHELL: Yes.

14 PRESIDENT GAILLARD: I focus on the first
15 aspects of the defense, which is--the first of your
16 two approaches to that problem.

17 Can I conclude from this statement that
18 your position is that in any event, the subsequent
19 pleadings are, in essence, the evidence of the
20 allegations which you made in broad terms anyway in
21 the state of claim; i.e., a pattern of abusive and
22 discriminatory conduct. Of course, I'm not

1 prejudging the reality of this. I'm just following
2 your argument that we have to take that as is for
3 the purposes of the jurisdictional claims or
4 objections; right?

5 MR. MITCHELL: Yes.

6 PRESIDENT GAILLARD: So, you say it's all
7 contained in there, and that's more evidence of the
8 same thing.

9 MR. MITCHELL: Can be used by you to
10 support the allegations of the pattern of conduct
11 alleged in the Statement of Claim.

12 Again, I come back to the point that this
13 is not the issue before the Tribunal on the
14 jurisdictional motion. Again, because the Tribunal
15 must assume that the pattern of conduct alleged by
16 the investor is true.

17 PRESIDENT GAILLARD: Right, but do you
18 accept that we have to know what is the nature of
19 the claims you're making on the merits? Even if we
20 have to assume that everything you said from a
21 factual standpoint is right, do you accept, and if
22 we accept that aspect, do you accept that we also

1 have to consider the nature of the claims to see if
2 we have jurisdiction on those facts, depending on
3 how we rule on other aspects which are disputed?

4 MR. MITCHELL: I think that starts to
5 stray into an area that the parties haven't briefed
6 in the motion in terms of what is the task on a
7 jurisdictional motion.

8 The Methanex panel certainly addressed
9 that question and concluded that they were confined
10 to issues strictly of jurisdiction as opposed to
11 admissibility without getting into the debate as to
12 where you would draw that line, and concluded that
13 unless the claims were, and I think the words used
14 were incredible, unless the claims alleged were
15 incredible--frivolous was another word used--that
16 the allegations were assumed to be true, and then
17 the claim would proceed.

18 But again, to go back to the issue that's
19 being articulated is the narrow issue relating to
20 1901(3) and whether it excludes any matter touching
21 upon AD and CVD law, and I say that that's the
22 issue that the Tribunal is confined to on the

1 motion.

2 PRESIDENT GAILLARD: Thank you. That's
3 clear.

4 I turn to my co-arbitrators. Conrad, do
5 you want to start?

6 ARBITRATOR HARPER: Thank you,
7 Mr. President.

8 PRESIDENT GAILLARD: You have a comment?

9 MR. CLODFELTER: A question of how we are
10 going to proceed here. Will the parties have an
11 opportunity to respond to answers given to the
12 questions before you go on to the next question?

13 PRESIDENT GAILLARD: Yes. Maybe you
14 should answer now. Do you want a brief answer to
15 this?

16 Let's discuss the procedure. I think on
17 each question the idea is that on each question
18 both sides will have an opportunity to speak. You
19 may or may not want to do it. I'm not asking the
20 parties to be systematic, and we will not assume
21 that you agree if you say nothing on the particular
22 issue. That's obvious, but you may choose to

1 answer.

2 MS. MENAKER: We have answers to both of
3 the two questions we would like to offer.

4 PRESIDENT GAILLARD: Please do.

5 MS. MENAKER: Mr. Clodfelter will answer
6 the second question first.

7 MR. CLODFELTER: Yesterday, it was asked
8 whether or not Canfor intended to supplement or
9 update or amend its claim by the allegations it has
10 made in its briefs on this issue. We still have
11 never heard an answer to that. Now, surely they
12 can take a position on that. They have to know
13 what their own intention is. So far we have not
14 heard any representation by counsel that Canfor is
15 changing their claim.

16 So, our assumption is that the allegations
17 in the Statement of Claim are still the allegations
18 of conduct on which they base their claim. Now, if
19 that's different, it's incumbent upon them to say
20 so. We can't proceed not knowing or guessing at
21 these kind of fundamental questions.

22 So, we assume the claims as stated in the

1 Statement of Claim, and whatever else they say can
2 be taken into consideration, of course, but the
3 conduct at issue is that stated in the Statement of
4 Claim.

5 PRESIDENT GAILLARD: It seems to me that
6 the record is pretty clear on that; I mean on that
7 issue. I'm not saying that what you say is right,
8 but I think the determinations of both parties are
9 clear, at least as far as the Tribunal is
10 concerned.

11 MS. MENAKER: Thank you. Now I would just
12 like to make some--address the President's--your
13 first question, and I think you understand our
14 position perfectly well, which is that imposing an
15 obligation on the United States to arbitrate, that
16 is an obligation, but I wanted to offer a response
17 to Mr. Howse's comment on that point.

18 When looking at the terminology of Article
19 1901, Mr. Howse had said that what you need to do
20 is--you need to read Article 1901(3) in context to
21 see what Article--excuse me, what Chapter 19 says
22 about a party's rights and obligations with respect

1 to antidumping and countervailing duty law, and
2 only then can you ascertain what the term
3 obligations, what obligations that encompasses.

4 And he said, for example, those
5 obligations, by looking at Chapter 19, include the
6 extent which can you retain your law, the extent to
7 which can you amend your law.

8 Now, what he left out was the obligations
9 that are contained in Article 1904, and those are
10 the obligations to submit one's AD/CVD
11 determinations to binational panels who are going
12 to review them under the standard of review set
13 forth in Article 1904, and that is not an empty
14 obligation. It is an obligation of great import.

15 We have many free trade agreements with
16 other countries, many bilateral investment
17 treaties, many other international instruments with
18 other countries. This system is unique. The
19 United States has undertaken this obligation with
20 respect to Canada and Mexico, and have undertaken
21 the obligation to submit our determinations to
22 binational panel reviews. That is most certainly

1 an obligation.

2 And if you take a look at the statement of
3 administrative action at page 194, that instrument
4 describes, it says, and I quote, the centerpiece of
5 Chapter 19 of the NAFTA is the procedure described
6 in Article 1904.

7 So, I think that really answers the
8 question that one of the obligations in Article
9 19--in Chapter 19--is the obligation to submit the
10 determinations to binational panel review and so,
11 therefore, once you accept that that is an
12 obligation, I don't see how you can say that the
13 obligation to arbitrate pursuant to the procedure
14 set forth in Section B of Chapter 11 is not also an
15 obligation that is imposed with respect to that
16 law.

17 PRESIDENT GAILLARD: Thank you. Any
18 comment on the other side before we have a question
19 from Professor Weiler?

20 MR. MITCHELL: No. We will stand on the
21 submissions made.

22 ARBITRATOR WEILER: Ms. Menaker, I also

1 think I understand you. I hope I understand your
2 position. To what extent is the last argument you
3 made--to what extent would I have to find it
4 compelling based on also accepting your other
5 argument that the word law includes individual
6 determinations? And I'm not saying that I will do
7 this, but let's assume that the Tribunal buys into
8 the Canfor argument that law in 1901(3) refers to
9 normative, precedential, but doesn't, for example,
10 refer to individual arbitrations, to individual
11 determinations, and I'm not saying that we will
12 find that, but to what extent is this last argument
13 you make dependent on agreeing with you also on
14 that additional point?

15 MS. MENAKER: It is not dependent on that.
16 If Article 1901(3), and I think this also answers a
17 question that was that was raised by the President
18 yesterday. When I put up the slide interposing the
19 words to amend in front of instead of obligations
20 and changed the word law to statute, even if
21 Article 1901(3) had read no party--no provision of
22 any other--

1 PRESIDENT GAILLARD: The short answer is
2 your two arguments are independent and stand-alone
3 arguments?

4 MS. MENAKER: That is correct because even
5 an obligation with respect to an antidumping or
6 countervailing duty statute would still--in our
7 view, all of our other arguments would still stand
8 because an obligation to arbitrate a dispute
9 concerning the application or interpretation of
10 that statute would still be an obligation with
11 respect to that statute.

12 PRESIDENT GAILLARD: Any comment on
13 Canfor's side on this?

14 MR. MITCHELL: No further comment.

15 PRESIDENT GAILLARD: All right.

16 Conrad, do you have further questions?

17 ARBITRATOR HARPER: Mr. President, I do,
18 thank you.

19 I just put this question generally to
20 Canfor. I don't know which of you, Messrs. Landry
21 or Mitchell would like to respond, and consider
22 that as true for all the questions I wish to put.

1 I'm wrestling very hard to understand
2 exactly what is before us, and I've heard the
3 discussion about the Statement of Claim and the
4 additions that are contained in the memorials
5 submitted by Canfor, but maybe I could bring this
6 point to a head by putting this precise question
7 which may admit of a yes or a no answer. It may
8 not, but I throw that out as perhaps a way of
9 focusing the matter.

10 Would Canfor allege that this Tribunal was
11 in error if in our final decision on this pending
12 motion we said that we assumed for purposes of the
13 motion that the claims made by Canfor are rooted in
14 antidumping law and countervailing duty law?

15 MR. MITCHELL: Yes.

16 ARBITRATOR HARPER: You would say that was
17 error?

18 MR. MITCHELL: Yes, and let me elaborate
19 on that.

20 Claims, to the extent we talk about what a
21 claim is rooted in, have two aspects. One is the
22 legal regime or normative standards that apply to

1 the evaluation of the claim, and the other is the
2 factual matrix. We think about a decision or a
3 determination or an award as being the application
4 of a legal standard here rooted in Chapter 11 of
5 the NAFTA to a set of facts the evidence evaluated
6 by the Tribunal to determine what did or did not
7 occur, and the resulting decision or award of the
8 Tribunal.

9 So, when you talk about what the claim is
10 rooted in, the distinction is between the legal
11 obligation here, Chapter 11 and the Chapter 11
12 regime, and the factual matrix which has a
13 connection to the antidumping sphere. And I focus
14 on sphere because it is far broader. What you look
15 at when you look at what the claim is rooted in is
16 the conduct of which you complain, and you apply
17 the Chapter 11 standards to the chapter--or to the
18 facts which the Tribunal finds after a hearing
19 which here we define as abusive, politically
20 motivated, predetermined conduct, just to put it
21 into a narrow focus. And that, we say, that's not
22 rooted in antidumping or CVD law.

1 ARBITRATOR HARPER: Let me press you on
2 that, Mr. Mitchell, because I'm not sure I
3 understood what you just said. When you say it's
4 not rooted, the conduct of which you complain, in
5 antidumping and countervailing duty law, are you
6 saying that because you don't believe the conduct
7 is legal, or because the conduct has nothing to do
8 with antidumping and countervailing duty law?

9 MR. MITCHELL: I wanted to try and clarify
10 this. As has been made clear, the conduct
11 complained of relates in many respects to the
12 discretionary actions of the United States
13 officials who do carry out responsibilities under
14 the AD and CVD regimes. That is clear. That
15 conduct that we complain of, we say, is unlawful at
16 the international level under Chapter 11.

17 So, it arises from or has a connection to
18 that AD and CVD sphere. That is clear, and it
19 relates to in many respects the discretionary
20 action of the officials in that sphere. But the
21 claim relates to the Chapter 11 standard applied to
22 the conduct of the United States officials aimed at

1 targeting and abusing investors such as Canfor.

2 ARBITRATOR HARPER: Let me turn to another
3 subject.

4 PRESIDENT GAILLARD: If it's another
5 subject, Joseph has a question.

6 Professor Weiler.

7 ARBITRATOR WEILER: It's really a direct
8 follow-up on that. Yesterday, I was under the
9 impression, perhaps erroneous, in reply to a
10 question of mine that Canfor took the position that
11 also antidumping determinations or whatever falling
12 shorts of the word law as you understand it, which
13 were lawful could constitute a violation of Chapter
14 11; but now on two separate occasions and most
15 recently in response to my brother, should I say,
16 Mr. Harper, you seem to suggest that it's only
17 abusive illegal conduct which would qualify.

18 Did I misunderstand yesterday, or am I
19 misunderstanding today?

20 MR. MITCHELL: The--for Canfor to succeed
21 in our claim, we have to establish the
22 international illegality, and that, as I think

1 Mr. Landry was making submissions on this
2 yesterday, is independent of the domestic legality
3 or illegality, although the domestic legality or
4 illegality may be relevant--I have got to be
5 careful how I phrase that--it's independent of the
6 domestic or municipal legality or illegality,
7 although the Tribunal may find it relevant.

8 PRESIDENT GAILLARD: Although in your last
9 submissions you insist on the fact that the U.S.,
10 according to you, is breaching--is refusing to
11 honor certain decisions which are taken pursuant to
12 the Chapter 19 regime, so it is relevant in your
13 opinion?

14 MR. MITCHELL: Yes. The conduct of the
15 United States in relation to its actions in
16 relation to the determinations is relevant.

17 See if I can--

18 PRESIDENT GAILLARD: Why is that? Because
19 it's some kind of an indication both of conduct
20 which may be illegal under international norms?
21 I'm trying to understand you.

22 MR. MITCHELL: Let me try this: If we

1 took the ITC threat of injury ruling and the
2 Chapter 19 Panel process that it went through, the
3 United States might ultimately argue that because
4 the DOC or the ITC, as I think we heard today,
5 ultimately and begrudgingly adopts the or renders a
6 determination not inconsistent with the Chapter 19
7 Panel that they are operating in accordance with
8 United States law.

9 But this Tribunal might find it relevant
10 that the Chapter 19 Panel found, for instance, that
11 the Commission, the ITC, has made it plain by its
12 actions and words that it is disinclined to accept
13 the panel's review authority under Chapter 19 in
14 this case, and that given the extended amount of
15 time which is already being consumed by this
16 proceeding for the panel to postpone finality by
17 issuing yet another open-ended remand would be to
18 allow the Chapter 19 process to become a mockery
19 and an exercise in futility. That's taken from the
20 concurring award, and the majority is consistent
21 with that.

22 Those facts would be relevant to this

1 Tribunal's determination.

2 PRESIDENT GAILLARD: But what is the
3 argument under international law, is that in and of
4 itself is a breach of international law, to make
5 the process more curious? What's the relevance?

6 MR. MITCHELL: Again, the scope of the
7 1105 standards isn't before the Tribunal on this
8 motion, but if we accept that the standard
9 is--whether the conduct shocks judicial
10 sensibilities, or at least surprises them, which
11 seems to be roughly where the standard is right
12 now, that sort of conduct, we say, can amount to a
13 violation of the 1105 standards.

14 ARBITRATOR WEILER: I really want to--this
15 is very, very crucial, at least to my personal
16 understanding of--this is following up both on
17 Mr. Harper and the President. I can fully accept
18 your claim that we should assume the facts to be
19 correct. The jurisdictional issue actually breaks
20 into two at least, because first of all, there is a
21 question of principle, whether at all there can be
22 Chapter 11 proceedings which relates to facts which

1 in some ways, and I can't use a neutral term,
2 rooted in or derived from or connected with
3 antidumping and countervailing duties of a member.

4 Now, with this in mind, yesterday I
5 flagged for you an issue that was of concern to at
6 least this member of the panel, which was abandon
7 the facts of Canfor and try and give us examples of
8 the kind of practice which would be related to
9 antidumping, and I said maybe lawful practice under
10 the laws of the member. It could be Mexico, it
11 could be Canada, it could be the United States
12 because many times there is lawful action of a
13 state which, although it's lawful under the rules
14 of the state and in our area of Chapter 19, this is
15 state law that governs, might still violate an
16 international standard.

17 So, I said give us hypothetical examples.
18 This is with the view to understand what is the
19 kind of conduct which could, which could, if we
20 accepted, violate chapter 11, and that would enable
21 us, even if we accept the facts as alleged in the
22 Statement of Claim, we would still have to decide,

1 and even if we rejected the United States's
2 argument that in no circumstances whatsoever,
3 although for there I will have a question later to
4 Mr. Clodfelter, can there be a Chapter 11 claim, we
5 still have to decide whether the facts alleged by
6 Canfor and accepted provisionally by us as true, as
7 you want us to do, would amount to the kind of
8 contact which would violate Chapter 11 and would
9 not, even though they are related in some way to
10 anti-dumping.

11 So, that's why independently of the facts
12 I return. Are you now abandoning the notion that
13 lawful action can nonetheless violate in the area
14 of antidumping, could violate Chapter 11?

15 MR. MITCHELL: No, and I'm going to pass
16 this on to Mr. Landry momentarily to provide an
17 elaboration to you, but I want to go back to the
18 latter part of your observation as to whether,
19 given the facts that we have alleged in the
20 Statement of Claim and the pattern of abusive
21 conduct that we allege, assuming we get over the
22 first hurdle you described relating to whether any

1 claim can be brought in an AD or if it attaches on
2 an AD or CVD matter, that the Tribunal still has to
3 decide the next question, whether the facts alleged
4 do fall within it.

5 ARBITRATOR WEILER: And you would say that
6 we have to decide in a second phase?

7 MR. MITCHELL: Absolutely. And that's not
8 the issue that's being briefed before you.

9 ARBITRATOR WEILER: I understand. But in
10 order to enable us to decide the first issue,
11 whether there is a possibility of bringing a claim,
12 under Chapter 11, even though this is rooted in a
13 pattern of facts that related to Chapter 19, and
14 that's why to the best of my abilities, which might
15 not be so good, I suggested give us hypothetical
16 instances where we could see that there could be a
17 violation. Because, if I cannot envision any
18 factual circumstance that would actually violate in
19 relation to antidumping and countervailing duty
20 which would actually violate Chapter 11, then I
21 would say ex hypothesii, there is no possibility to
22 bring it. So that's why we need to hear the kind

1 of things, the kind of conduct that would
2 constitute a violation, and I understand better the
3 question of some abuse of things, but the question
4 is, is there a nonabusive context which nonetheless
5 might constitute a violation?

6 MR. MITCHELL: I'm going to pass that to
7 Mr. Landry to address.

8 MR. LANDRY: Just to follow up on that,
9 Professor Weiler, and I will respond to a specific
10 example, although it's difficult to do it in the
11 hypothetical, but I will try to give you a specific
12 example. But just to follow up on that, we start
13 from one proposition I think we could all accept,
14 is that we may have something that is consistent
15 with domestic law, but inconsistent to an
16 international obligation, and I used the
17 antidumping CVD regime to test that proposition.
18 There are numerous occasions in respect of this
19 specific dispute where things have been found
20 consistent with U.S. domestic law but inconsistent
21 with the WTO law.

22 I will use one example, just one example,

1 and I'm only using this in the context of the
2 exchange that we are trying to have here. Zeroing.
3 Found consistent by the Chapter 19 Panel and found
4 inconsistent in the application of it by the WTO
5 Panel. So, we had something that is different, and
6 I think that's your point. You want to get into
7 this difference concept.

8 Now, it's hard to go to any hypothetical
9 example, but I will choose my own--

10 ARBITRATOR WEILER: I would like the
11 equivalent of zeroing in relation to Chapter 11.

12 MR. LANDRY: Land perhaps zeroing is a
13 good example in and by itself. Let me try
14 something a little different, and let's assume for
15 the moment that this is Canada, my own country, so
16 that I don't suggest something of another country.

17 Let's assume again under Canadian law that
18 in the collection of duties a discretion is given
19 to an official within their regime, and the
20 discretion effectively is that when duties are
21 paid, they have the discretion for no reason
22 whatsoever. In other words, they do not have to

1 give reason to take those duties and to pay it out
2 to the domestic industry.

3 Now, if they don't pay it out to the
4 domestic industry, notwithstanding they have the
5 discretion, that would be nothing that nobody could
6 question that; in fact if they do pay it out, it
7 was the discretion that would be given to him under
8 Canadian law and we'll assume no other remedies for
9 the moment. We are just talking about Chapter 19.
10 Then under Chapter 19 it could be lawful there, but
11 the taking of the duties, if that's what happened,
12 and giving it to the domestic competitor of the
13 foreign investor may be an expropriation, for
14 example.

15 So, it is difficult to deal in the
16 abstract, okay, but in that type of case it may be
17 perfectly consistent with the domestic law in
18 Canada, and therefore if the Chapter 19 Panel
19 looked at it and said no, there was discretion in
20 the official, it's under the domestic law,
21 therefore we can't question it, but it may be an
22 expropriatory act that somebody could question at

1 customary international law, and more importantly,
2 in our context, under Chapter 11.

3 PRESIDENT GAILLARD: On respondent's side,
4 do you have any comment on this issue?

5 MS. MENAKER: Would you like us to limit
6 our response to the last question, the last
7 comment? We don't--

8 PRESIDENT GAILLARD: I was thinking of the
9 last series of--last exchange.

10 MS. MENAKER: Certainly.

11 We cannot envision a scenario where a
12 circumstance arises concerning an antidumping and
13 countervailing duty matter that is found to be
14 lawful under domestic law and yet would violate
15 Chapter 11. We don't think there is any such
16 scenario. We haven't heard any from Canfor. They
17 raised the scenario of zeroing, and as you noted,
18 that would not implicate Chapter 11.

19 This latest hypothetical, and I would note
20 that this is not a claim that they are bringing,
21 that they are not claiming that under an
22 official--in an official's discretionary act that

1 official sought to take duties that were collected
2 from Canfor and distribute them. That is not part
3 of the claim.

4 However, they raised the prospect that
5 perhaps that would be an expropriation, but Chapter
6 11 covers investments, so what is that an
7 expropriation of? The payment of duties are not
8 investments. That's not within the definition of
9 an investment.

10 You pay--you can impose a high tariff, and
11 that would not give rise to--I won't go into
12 hypotheticals, but in that situation we don't think
13 that that would give rise to a Chapter 11 claim, so
14 I don't think that scenario fits. And as I've
15 said, it's certainly not pled in their Notice of
16 Arbitration.

17 And the other thing that I would note is
18 that the Chapter 19 Panels, when determining
19 whether something in AD/CVD matter when that's
20 before them and they are determining whether that
21 is--was issued in compliance with domestic law, if
22 you had a system in place or a law in place that

1 essentially was--if you can imagine that having
2 violated an international standard because it was
3 inequitable in some case, I would just like to make
4 sure that the Tribunal is aware of the governing
5 law that governs a Chapter 19 Panel, and that is
6 that the is panel supposed to apply the law of
7 the--domestic law of the party, including general
8 principles of law, and those--that term is defined
9 in Chapter 19 and Article 1911. It says general
10 legal principle includes principles such as
11 standing, due process, rules of statutory
12 construction, mootness, and exhaustion of
13 administrative remedies.

14 So, when a Chapter 19 Panel is reviewing a
15 determination under domestic law, they are applying
16 standards of due process. So, if you can think of
17 a scenario where the law might have been applied in
18 a manner that violated due process, again that is
19 something that a Chapter 19 binational panel would
20 be looking at in its review.

21 ARBITRATOR WEILER: Might be looking at it
22 under domestic standard of due process which may

1 not correspond to international standard.

2 MS. MENAKER: And again, we have not been
3 able to envision such a hypothetical. I think it's
4 incumbent upon Canfor, if it thinks that there is
5 such a case, to bring it to our attention.

6 PRESIDENT GAILLARD: Mr. Harper. Maybe we
7 could take another question, another exchange and
8 we will break for lunch.

9 ARBITRATOR HARPER: Thank you,
10 Mr. President. Let me explore for a moment the
11 issue of a consequence because I'm frankly baffled
12 by the discussion that I heard earlier today.

13 The idea, as I heard it articulated by
14 Canfor, was that the United States appearing in
15 defense of a Notice of Arbitration because it had
16 abusively used its antidumping law so as to give
17 rise to a claim by Canfor that was in arbitration
18 was not deemed by Canfor to be an action in respect
19 of the antidumping law, but only a consequence of
20 U.S. action that was abusive. I think I fairly
21 summarized. If I have not, I'm sure that I shall
22 be corrected.

1 And so I have been mulling what this means
2 how a consequence cannot be in respect of
3 something, and I thought initially of two plus two
4 equals four, thinking that perhaps by translating
5 it to the simple that I would grasp the concept,
6 and there my difficulty is, and I would be grateful
7 to you, Mr. Landry, or you, Mr. Mitchell, to help
8 me. Because as I see it, four in that computation
9 is a consequence of the addition of two plus two.
10 Four is also a total in respect of that addition of
11 two plus two. So, perhaps can you explain to me
12 how a consequence is not in respect to or with
13 respect to.

14 MR. MITCHELL: I'm not sure that the
15 debate can be simplified down to the mathematical
16 equation.

17 The argument is or what the United States
18 must establish is that we are imposing an
19 obligation, whatever that term means, and I should
20 just pause there, that if I took the Webster's
21 definition of obligation, it's the act of obliging
22 one's self to a course of action or something that

1 one is bound to do or forbear which, again, I say
2 goes to support the argument that I made yesterday.

3 But the obligation has to be with respect
4 to--that is, the relational connection between the
5 obligation, has to be in a relation to the defined
6 term countervailing duty law. The question for the
7 Tribunal is what did the parties mean when they
8 said that instead of saying an obligation with
9 respect to a CVD measure, for instance.

10 And what I urge on the Tribunal is that
11 imposing a consequence because of behavior, the
12 measures of which Canfor complains is not an
13 obligation with respect to. It's not a duty to do
14 something or refrain from doing something with
15 respect to or applied to that law.

16 And what the United States is urging is to
17 broaden the scope of what the narrow words
18 obligation with respect to CVD or AD law mean to
19 anything that the United States is required to do
20 because of something to do with their AD or CVD
21 law. And what I say, and I tried to explain this
22 in terms of the use of the word consequence, is

1 that's not what the parties meant by obligation
2 when used in relation to law.

3 PRESIDENT GAILLARD: We are going for five
4 minutes, and then we will break for lunch.

5 ARBITRATOR HARPER: Earlier in your
6 presentation, Mr. Mitchell, you had occasion to
7 begin with a statement again--and if I have
8 misquoted you, please correct me--that this
9 Tribunal cannot determine whether what is alleged
10 is antidumping or countervailing duty law matters.
11 These must be litigated. Perhaps I should stop
12 right there because that's a predicate for the
13 question, but I don't want to have the predicate
14 wrong.

15 Have I got it correctly that you had said
16 something to that effect at the outset of your
17 initial comments today?

18 MR. MITCHELL: Let me just give you the
19 specific reference.

20 ARBITRATOR HARPER: That would be helpful.

21 PRESIDENT GAILLARD: Do you want to take a
22 break now and we start that answer when we resume

1 because we have four questions on the same topic?

2 I guess it's not going to be simple.

3 MR. MITCHELL: That's fine. If that's

4 what the Tribunal would like.

5 PRESIDENT GAILLARD: Yes, I think we would

6 like to suggest that.

7 Could we resume at two, or is that not

8 enough time? That gives us an hour for lunch.

9 That's enough time for both parties?

10 MR. MITCHELL: Based on the speed at which

11 we are going, is the Tribunal anticipating we will

12 likely conclude today?

13 PRESIDENT GAILLARD: It's really up to

14 you. The questions are long and compound in many

15 cases, but the answers are also complex, so it

16 really depends. I think we have a chance we could

17 finish today, but it's really up to you. We don't

18 want to preclude any party to express itself fully.

19 It's extremely important issues, and we want to

20 give you ample opportunity to discuss all this. I

21 would not give up--I would not dispose of the time

22 tomorrow prematurely, but why not? We may be able

1 to complete today.

2 Do you have--in this respect, do you have
3 any--I'm asking both parties. Do you have any
4 specific requests that we do continue tomorrow for
5 some specific type of issues, or not?

6 MR. MITCHELL: The only circumstance we
7 can envisage is if something comes up that we
8 require Professor Howse on.

9 PRESIDENT GAILLARD: We would like to have
10 your determination on that during the course of the
11 day, of course. On the U.S. side, do you see any
12 see any reason why we would have to come in
13 tomorrow?

14 MS. MENAKER: No.

15 PRESIDENT GAILLARD: So, we will see how
16 we are doing today, and we certainly--we won't have
17 a hearing tomorrow if we are done today. I mean,
18 it's not for the sake of having a hearing. On the
19 other hand, we don't want you to sort of fill in
20 your calendar prematurely, so we will resume at
21 two.

22 (Whereupon, at 1:00 p.m., the hearing was

1 adjourned until 2:00 p.m., the same day.)

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1 AFTERNOON SESSION

2 PRESIDENT GAILLARD: We are back on the
3 record. Mr. Harper was asking certain questions.
4 Before I give him the floor, Professor Howse was
5 able to come back, so he's here, and welcome him
6 back, even if it's an unhappy circumstances which
7 bring him back because the plane was not operating.
8 But we are glad you are here for the purposes of
9 this hearing.

10 Mr. Harper will resume the questions.

11 ARBITRATOR HARPER: Thank you, Mr.
12 President.

13 Mr. Mitchell, I think you were trying to
14 find precisely in the transcript the predicate for
15 the question I'm about to address to you. Did you
16 find it?

17 MR. MITCHELL: Yes, Mr. Harper, I was.
18 And there are two passages that could be referred
19 to. The specific point to which I was responding
20 was the point made by Mr. Clodfelter at on my
21 transcript page 20, starting at line one where he
22 said: "The general point is that a party may not

1 avoid a Chapter 11 merely by labeling its conduct
2 as antidumping and countervailing duty law, if a
3 matter is not generally subject to obligations with
4 respect to countervailing and antidumping duty law
5 simply calling it AD/CVD law will not shield a
6 state from Chapter 11 implications. The Tribunal
7 is free to look to see if, in fact, it is conduct
8 subject to obligations with respect to the--to
9 antidumping and countervailing duty laws, so
10 fraudulent attempts to disguise otherwise violative
11 behavior cannot be shielded by Article 1901(3)."

12 And my analysis of that passage and
13 interpretation of that passage is at on my pass
14 transcript again starting on page 93, and the
15 submission that I make is that once Canfor has
16 alleged that the conduct is not--is sufficiently
17 violative of the obligations and sufficiently
18 arbitrary, it's insufficient for the United States
19 to say that that conduct is, however abusive or
20 arbitrary, related to CVD, and therefore exempt,
21 and I say that that's a question that the Tribunal
22 would have to address at the merits phase of the

1 proceeding.

2 ARBITRATOR HARPER: And that's exactly
3 where I'm having my problem. I thank you very much
4 for giving me the transcript references and your
5 explication. It seems to me that the position of
6 Canfor puts the Tribunal on the horns of a dilemma
7 that cannot be resolved. On the one hand we have
8 the obligation in light of the objection to
9 jurisdiction to determine whether we have
10 jurisdiction, and on the other we are being told we
11 cannot really say whether or not Canfor's claims
12 are in their nature or by their association or by
13 their roots antidumping or countervailing duty law
14 claims.

15 And so, maybe you could help me figure out
16 how the Tribunal is to act in light of the dilemma
17 that it seems to me Canfor's position has put us
18 in.

19 MR. MITCHELL: Yes, I'm happy to,
20 Mr. Harper, and thank you for the opportunity.

21 It seems to have become commonplace in
22 Chapter 11 arbitrations for the state to advance a

1 jurisdictional objection. That's happened in
2 Loewen, it's happened in Methanex, it's happened in
3 Ethyl. It's happened here. It's happened in many
4 different cases.

5 And the Tribunal has three choices. If
6 the matter is properly something that on the
7 assumed facts recognizing the Tribunal's limited
8 role, and I will talk about that in a minute on a
9 jurisdictional motion, if the Tribunal is able to
10 resolve the jurisdictional question neatly raised,
11 then it may do so. Or it may determine that it
12 can't do so at that time, and may refer the matter
13 to merits, or it may determine it in, part, and
14 refer other parts to merits.

15 And so, in, for instance, the Loewen case,
16 the Tribunal determined that it could not resolve
17 many of the jurisdictional objections raised by the
18 United States, and they were joined to merits.

19 The most complete discussion of the
20 Tribunal's role and mandate in an UNCITRAL
21 arbitration in Chapter 11 is in the Methanex case,
22 and I've included that in our authorities.

1 And the Tribunal there, a very
2 distinguished Tribunal, was at pains to note the
3 distinction between challenges to jurisdiction,
4 which it said it could address, and challenges to
5 admissibility, which it made clear that under the
6 UNCITRAL Rules it did not have the authority to
7 address. And in the results in the Methanex case
8 and the discussion--I'm not going to walk you
9 through it, but the discussion commences on page 43
10 and continues through to page 58, where the
11 Tribunal approaches the difference between
12 jurisdiction and admissibility, and determines that
13 for many--indeed most--of the challenges raised by
14 the United States to the Tribunal's jurisdiction in
15 Methanex, either they were admissibility challenges
16 or they were something that otherwise had to be
17 joined to the merits.

18 So, while the Tribunal has the power to
19 determine on a motion whether it has jurisdiction,
20 it is constrained in doing so to make sure that in
21 examining that question it assumes that the facts
22 are true, and it doesn't proceed to evaluate those

1 facts beyond determining whether they are, to use
2 the Methanex word, incredible.

3 ARBITRATOR HARPER: Is it the position of
4 Canfor that the Tribunal should overrule the
5 objection to jurisdiction on the grounds that
6 nothing that Canfor is pleading relates to
7 antidumping and countervailing law
8 duty--countervailing duty law?

9 MR. MITCHELL: I don't think that that
10 statement accurately or completely encompasses the
11 submission being advanced on behalf of Canfor.
12 Canfor says that the objection to jurisdiction must
13 be dismissed because Article 1901(3) does not
14 exclude Canfor's claims, and that the words
15 imposing an obligation with respect to a
16 countervailing duty law or antidumping duty law do
17 not contemplate the nature of the proceeding that
18 Canfor is bringing.

19 ARBITRATOR HARPER: I just want to be
20 clear because I'm having trouble understanding the
21 words that I'm being given. Let me try it this
22 way, Mr. Mitchell: Is it the case that Canfor

1 complains in this proceeding that conduct of
2 American officials in enforcing U.S. antidumping
3 and countervailing duty law determinations has
4 harmed Canfor?

5 MR. MITCHELL: We are looking to make sure
6 we understand the question, Mr. Harper.

7 PRESIDENT GAILLARD: Please, take your
8 time.

9 (Pause.)

10 MR. MITCHELL: Mr. Harper, I apologize.
11 We are all having difficulty understanding the
12 import of the question. Is it possible that you
13 could elaborate or that you could focus me on the
14 area that's causing you concern?

15 ARBITRATOR HARPER: Are the allegations
16 that Canfor makes against U.S. official actions
17 allegations that arise by virtue of actions taken
18 by U.S. officials to enforce U.S. antidumping law
19 and countervailing duty law?

20 PROFESSOR HOWSE: Mr. Harper, I'm going to
21 try and help out and see whether I correctly
22 understand the question.

1 One meaning to the question would be that
2 you would like us to confirm that Canfor
3 acknowledges that the factual context or factual
4 matrix of this case is the antidumping and
5 countervailing duty--that's the factual context of
6 the case, the subjection of the investor to
7 determinations and other acts of officials in
8 relation to that context.

9 And I would suppose that we would simply
10 confirm that. I don't think that from our point of
11 view there is any doubt that the factual context of
12 the treatment of the investor in this case was the
13 context where they were being subjected to these
14 processes, these determinations, and U.S.
15 proceedings in relation to them.

16 But if I misunderstood or we have
17 misunderstood, perhaps you were asking something
18 more than that.

19 ARBITRATOR HARPER: Is that the entire
20 answer Canfor wants to give me to the question?

21 PROFESSOR HOWSE: Well, sir, with respect,
22 if we are missing something that you're concerned

1 about, that's one way we can puzzle out we believe
2 you might be driving at or wanting us to confirm,
3 but if there is something else you would want to
4 know our position on or to test our position on,
5 maybe if you could spell out a bit what the
6 something else is. If there is some other
7 proposition you're testing in terms of whether it's
8 a proposition that Canfor is advancing in this
9 proceeding.

10 ARBITRATOR HARPER: Professor Howse, thank
11 you for that. Let me see if I can approach it this
12 way and then I will move on to one other short
13 subject.

14 Professor Howse, according to my LiveNote
15 transcript--I'm now looking at page 150, line
16 three--I'm doing the somewhat inelegant thing of
17 quoting myself, but according to the transcript, it
18 is stated that I said: Are the allegations that
19 Canfor makes against U.S. official actions
20 allegations that arise by virtue of actions taken
21 by U.S. officials to enforce U.S. antidumping law
22 and countervailing duty law?

1 Am I to understand what you just said as
2 being a yes to that question?

3 PROFESSOR HOWSE: Well, that's a more
4 complicated proposition because as Canfor is
5 pleading that a range of these actions are not
6 proper and not properly explained by an intent and
7 good faith to enforce those laws and have a
8 different explanation that engages, in our
9 submission, a breach of, among other provisions,
10 the provision of NAFTA requiring minimum standard
11 of treatment under customary international law.

12 So, we would want to qualify assent to
13 that proposition with our clear pleadings that we
14 do not believe that a number of these acts, or many
15 of them, could be explained by good faith efforts
16 at enforcing those laws as they stand.

17 PRESIDENT GAILLARD: If I may ask a
18 related question at this juncture, we understand
19 that we have three choices. You can say yes, we
20 have jurisdiction, you can say no, or we could join
21 to the merits. That, we can understand. But what
22 is the test, according to you, the legal test,

1 because you seem to imply that if you state that in
2 a matter which you admit is related somehow, and
3 I'm not prejudging any of the language
4 interpretation and all that. We understand all the
5 arguments surrounding this, but assuming--that's
6 why I use loose language, so it's related to AD or
7 CVD law in the broadest meaning, if we assume that.

8 You said, well, yes, but it's bad faith.
9 It's egregious, it's terrible, it's really bad, and
10 my question to you, we understand that allegation,
11 and at this stage it's an allegation. My question
12 to you is: For the purposes of our determination
13 on jurisdiction, what is the test? Is it enough
14 that you state that it's an outrages conduct which
15 goes beyond the normal application of AD law or CVD
16 law? Is it enough for us to go to the merits to
17 find out if that's right or wrong, or do we have a
18 certain duty to make a determination on something
19 at this stage, and in the affirmative, what is the
20 test, according to you? Does that help or it
21 doesn't help? Does it help to understand what we
22 want to understand as to your determination?

1 MR. MITCHELL: If we could just have a
2 moment.

3 PRESIDENT GAILLARD: Please.

4 (Pause.)

5 PROFESSOR HOWSE: Excuse me,
6 Mr. President, for having taken a break, but it's
7 an important--

8 PRESIDENT GAILLARD: That's quite all
9 right.

10 PROFESSOR HOWSE: --it's a very important
11 question.

12 It's Canfor's view that the United States
13 is obviously entitled to have brought this motion
14 and restricted the motion to the single issue,
15 whether 1901(3) is a complete jurisdictional bar to
16 any Chapter 11 claim that arises out of a factual
17 context related to AD and CVD laws, regardless of
18 the nature of the conduct.

19 So, we have been put in the position where
20 we have to address that motion at this stage,
21 without addressing all the other complex issues
22 that arise, obviously, on the merits of this

1 action, and issues that it may have some
2 jurisdictional implications, albeit not the
3 implication that 1901(3) is a jurisdictional bar.

4 It was not our choice that this issue be
5 severed from all the complex questions related to
6 it and questions that need to be dealt with on the
7 merits, but if the issue is going to be decided on
8 its own as apparently the United States is asking
9 the Tribunal to decide it on a preliminary basis,
10 we think then in that case the only fair
11 alternative is to assume the claims about the
12 nature of the conduct.

13 If, however, the issue is reserved for the
14 merits, then we will have the opportunity to prove
15 the conduct, and you will assess for yourselves
16 whether given--whether our characterization of the
17 conduct is persuasive to you, it will be such that
18 1901(3), which we argue is an interpretive
19 provision in any case, which would be brought in
20 perhaps under the merits would somehow be an
21 obstacle to our claims.

22 PRESIDENT GAILLARD: Mr. Harper still has

1 questions.

2 MR. MITCHELL: If I could just elaborate
3 on that answer in specific response to the
4 President's question.

5 PRESIDENT GAILLARD: Please, go ahead.

6 MR. MITCHELL: In addition to the comments
7 made by Professor Howse, the question of how a
8 Chapter 11 Tribunal is to approach the
9 jurisdictional question has been, not surprisingly,
10 litigated before, and in our memorial at tab or at
11 paragraph 25 on page eight, we set out just the
12 relevant passage from Methanex, and they say this:
13 In order to establish the necessary consent to
14 arbitration, which is the sole objection brought
15 here, it is sufficient to show, one, that Chapter
16 11 applies in the first place; i.e., that the
17 requirement was 1101 are met; and two that the
18 claim is being brought by a claimant investor in
19 accordance with Articles 1116 and 1117 and that all
20 preconditions and formalities required under
21 Articles 1118 through 21 are satisfied. Where
22 these requirements met by a claimant, 1122 is

1 satisfied and the NAFTA parties' consent to
2 arbitration is established.

3 Now, I want to come back and talk about
4 that passage in just a second, but as well in the
5 Ethyl case, the early jurisdictional case in that,
6 and that's at Tab 3 of our original materials, at
7 page 31, the Tribunal said this: On the face of
8 the Notice of Arbitration and the Statement of
9 Claim, Ethyl states claims for alleged breaches by
10 Canada of its obligations under Articles 1102,
11 1106, and 1110. The claimant indisputably is
12 investor of a party, namely the United States, and
13 alleges that it is incurred loss or damage by
14 reason of or arising out of such breaches, all as
15 required by Article 1116. It is likewise beyond
16 doubt that the claimant has acted within three
17 years of the time when it first acquired or should
18 have acquired knowledge of the alleged breach and
19 knowledge that it incurred loss or damage as
20 stipulated in Article 1116(2).

21 Claimant's Statement of Claims satisfies
22 prima facie the requirements of Article 1116 to

1 establish jurisdiction of this Tribunal. As was
2 stated in the administrative decision number 11
3 quoted in K. S. Carlston, "The Process of
4 International Arbitration," "When the allegations
5 in a petition bring a claim within the terms of the
6 Treaty, the jurisdiction of the commission
7 attaches."

8 Now, let me just address both of those
9 passages in the context of this case. While the
10 United States has had some discussion which we say
11 is to this motion irrelevant of Article 1101 and
12 whether what we complain about is an investment
13 measure, that question has been expressly severed
14 from this motion. Therefore, the question for the
15 Tribunal is, is the United States correct in
16 establish--in its proposition that whenever a
17 Chapter 11 claim touches on matters relating to CVD
18 or AD matters, it is excluded from--by Article
19 1901(3)? That becomes the neat question because
20 the other requirements as met or as set out by both
21 the Methanex Tribunal and the Ethyl Tribunal have
22 been indisputably been met.

1 PRESIDENT GAILLARD: Thank you.

2 Mr. Harper, do you want to finish your line of
3 questions?

4 ARBITRATOR HARPER: Thank you,
5 Mr. President. I have one more question for
6 Mr. Mitchell.

7 If I recorded correctly your arguments in
8 chief today, Mr. Mitchell, you stated that Canfor
9 relies on all U.S. actions up to the day of hearing
10 for its claim. And again if I misquoted you,
11 please let me know. This comes back, of course, to
12 the vexed question for the Tribunal of what it is
13 we are to decide.

14 Is it Canfor's position that anything that
15 has happened up until December 8, 2004, by U.S.
16 officials that touched on anything that Canfor was
17 doing is now before this Tribunal?

18 MR. MITCHELL: The issue before this
19 Tribunal is the jurisdictional issue that I just
20 articulated in my last response to President
21 Gaillard's question. The question of what will
22 Canfor plead and rely upon at the hearing on the

1 merits will relate to all conduct which falls
2 within the conduct described, the ongoing pattern
3 of abusive conduct which has caused Canfor harm?
4 The Tribunal--and again, I make the point that's
5 not that question, is not before the Tribunal on
6 this application, and properly shouldn't be. If
7 the United States at some later point wants to make
8 the argument that, as Canada did in the Pope and
9 Talbot case, that a particular incident of conduct
10 does not fall within the scope of the arbitration,
11 then the United States will be free to do so. But
12 again, the United States has pleaded this very
13 motion as a neat and narrow question as to whether
14 it has any obligation to arbitrate claims that in
15 any way touch upon CVD or antidumping duty matters,
16 and that is the issue that the parties have briefed
17 and upon which we have made arguments to the
18 Tribunal.

19 ARBITRATOR HARPER: What did you mean when
20 you told us earlier today that Canfor was relying
21 on all U.S. actions up to the day of the hearing
22 for its claim?

1 MR. MITCHELL: Let me just clarify what my
2 remarks were. They were for clarity, Canfor
3 intends to rely upon all of the United States
4 conduct up to the date of the hearings on the
5 merits as the basis for its claim.

6 ARBITRATOR HARPER: Where is the citation
7 for that?

8 MR. MITCHELL: I have a feeling you and I
9 have different page numbers because your page 150 I
10 didn't have one at that point, but it's on mine
11 page 93, and it's about two pages into my initial
12 reply submission.

13 ARBITRATOR HARPER: Thank you.

14 PRESIDENT GAILLARD: Thank you. Professor
15 Weiler has a question.

16 ARBITRATOR HARPER: Sorry, I thought
17 Mr. Mitchell was finding his exact words so that he
18 could answer the question I just put to him, which
19 is what did he mean by those exact words.

20 MR. MITCHELL: Okay. I don't know how
21 much more that I can clarify them, but let me try
22 this: Canfor has pleaded that the United States

1 has engaged in and continues to engage in a pattern
2 of conduct directed at Canfor for improper purposes
3 with all the other matters we discussed that has
4 caused and continues to cause it harm. And Canfor
5 says that that conduct, that full array of conduct
6 is what it intends to put before this Tribunal on
7 the merits and ask for the Tribunal's ruling upon
8 them.

9 ARBITRATOR HARPER: So, you're not using
10 everything that's happened, as alleged, against
11 Canfor by U.S. officials for the purposes of the
12 jurisdictional motion?

13 MR. MITCHELL: To go back to the approach
14 to be taken to a jurisdictional motion, all of that
15 conduct has to be assumed to have occurred.

16 ARBITRATOR HARPER: What I'm searching for
17 is what is it? I'm sitting here on December 8,
18 2004. I need to know what I'm being directed to
19 consider in respect of the jurisdictional motion.

20 MR. MITCHELL: I don't mean to be obtuse.
21 The issue on the jurisdictional motion is as
22 narrowly defined in the memorials. Canfor has

1 pleaded that United States officials in their
2 various actions--and some are particularized in the
3 Statement of Claim--have acted intentionally,
4 arbitrarily, for politically motivated reasons to
5 harm Canfor and its investments, that they have
6 treated Canfor unfairly and discriminatorily in the
7 things they have done, and that that array of
8 conduct assumes to be true does not allow the
9 United States to rely upon the provisions of
10 Article 1901(3) as properly interpreted to deny
11 Canfor the right to attempt to prove its claim
12 under Chapter 11.

13 PRESIDENT GAILLARD: Thank you,
14 Mr. Mitchell.

15 On the U.S. side, is there any need for an
16 answer on this because, frankly, it was a
17 clarification of the position of claimant, but I
18 don't want to preclude from you making some remarks
19 on this.

20 MS. MENAKER: We are happy to wait and
21 answer any direct questions that the Tribunal has
22 directed to us.

1 PRESIDENT GAILLARD: Because we also have
2 questions for you. We operated backwards, but
3 you're next in line, so don't worry, we will have
4 questions for you. But before that, Professor
5 Weiler has questions I think still for the counsel.

6 ARBITRATOR WEILER: It's actually to both,
7 and it's directly on this issue. And I speak for
8 myself, and it goes to the question of what was
9 agreed that will be decided here.

10 I suppose one option for the Tribunal is
11 to accept that the claim is totally barred because
12 of 1901(3). At another extreme it might be a
13 position where one would say the claim is not
14 barred by 1903 because 1903 relates to a certain
15 set of legal considerations, and this is a
16 different cause of action. But it might be, and I
17 really say it might be that the panel could decide
18 that there would have to be very special
19 circumstances in order for a claim that arises from
20 adopting the formula of the President, not
21 prejudging the issue in the field of antidumping
22 and countervailing duties could be the subject of a

1 Chapter 11 claim. But then the question would be
2 whether the statement of facts presumed by the
3 panel satisfies those conditions because it might
4 be that it's not a question of the merits to show
5 at that point where they, in fact, violate Chapter
6 11, but whether they satisfy some conditions for
7 bringing this claim.

8 If the panel were to go down that road,
9 when would that have to be decided? Does, for
10 example, the United States accept that if the
11 panel--and I'm not saying we are going to do
12 this--we have not discussed anything--but that if
13 the panel would simply say it is not the case that
14 in all circumstances a Chapter 11 is barred when
15 it's related to AD and CVD, the jurisdictional
16 phase is finished and all other matters then are
17 joined with the merits and would be decided later
18 on.

19 And this is a real difficulty I'm having
20 because the way it was presented so far seemed to
21 be it's an either/or, and maybe there is a middle
22 position which says there would be conditions under

1 which, and then the question would be, even if we
2 assume everything that Canfor alleges is true,
3 whether it satisfies those conditions.

4 PRESIDENT GAILLARD: The question is
5 directed to both parties. Maybe Canfor first
6 briefly, and then we'll move on to the U.S. to
7 answer the same question.

8 MR. MITCHELL: Clearly, the middle ground
9 that--well, there is an array of middle ground, and
10 the Tribunal could rule in our favor that the
11 objection to jurisdiction must be dismissed because
12 we are correct in the interpretation or the
13 opposite, or join the matter to the merits.

14 The comments just made by Professor Weiler
15 about being--that being done with--I'm not sure if
16 the word was conditions, but I took that to be the
17 tenor of the question. I mean, conceivably that
18 could be done, but the position of Canfor is that
19 this is an extraordinary case, and the
20 circumstances are extraordinary, and Canfor is well
21 alive to the standards under Article 1105 and 1102
22 to which it would have to prove its case.

1 On top of that, I would like to ask
2 Professor Howse to comment.

3 PRESIDENT GAILLARD: Before we do that, we
4 understand, I think--the purpose of all these
5 questions is to understand your legal position. We
6 understand the position as to the facts. The
7 argument which goes that you have to assume the
8 facts for the purpose--as stated for the purpose of
9 the jurisdiction, we understand. It's a classic
10 argument. We are not saying it's right or wrong,
11 but we understand the argument.

12 In terms of the legal standard for our
13 determination, so you're saying it's an
14 extraordinary case. So, we would have to
15 assume--your position from a legal standpoint on
16 the jurisdictional issue is that we have to assume
17 that it is an extraordinary case in order to join
18 the matter to the merits, and then sort it out at
19 the merits phase. Is that your contention?

20 PROFESSOR HOWSE: Well, Mr. President, we,
21 Canfor, in general, would, as I understand it, not
22 object to this matter being dealt with at the

1 merits. The position we are in here is that we
2 have responded to, as you're well aware, the U.S.
3 motion to deal with it now on a stand-alone basis,
4 and one difficulty we have, of course, is that we
5 responded to a motion that is based on an argument
6 that 1901(3) is a complete jurisdictional bar
7 rather than an argument that there might be special
8 conditions or special concerns that would have to
9 be met in order for an action of this type that has
10 some relationship to some other proceeding on CVD
11 and AD law to go forward under Chapter 11.

12 And I could imagine that the fact--I mean,
13 while we, as Canfor has shown, there is
14 nothing--international law and, indeed, NAFTA, is
15 not a stranger to multiple proceedings. There
16 clearly might be issues about multiple proceedings
17 that would arise, should--

18 PRESIDENT GAILLARD: I hate to interrupt
19 you, but I would like to take--we understand these
20 arguments that were made before, but would like to
21 take them in sequence, so is the answer yes?

22 PROFESSOR HOWSE: That we would be

1 satisfied to have these issues resolved at the
2 merits? Yes.

3 PRESIDENT GAILLARD: Well, no, but the
4 legal test is that we have--in the same way we have
5 to assume that the facts as alleged by claimant are
6 right for the purposes of jurisdiction, we, in your
7 contention, have to assume that this is an
8 extraordinary case, and this contention alone would
9 induce us to sort of join any question to the
10 merits as long as we determine that 1901(3) is not
11 a complete bar of the issues that relate to
12 antidumping law or countervailing duty law.

13 MR. MITCHELL: Let me try it this way, and
14 I think the difficulty in the analysis is that the
15 question that you're asking moves towards the
16 question does this fall within Chapter 11? That
17 is, is this an investment measure or what is the
18 meaning of Article 1105 or what is the meaning of
19 Article 1110?

20 PRESIDENT GAILLARD: That's being
21 reserved. We assume that it's reserved. But for
22 the purpose of that question which I just asked, I

1 was assuming that is reserved, the investor
2 argument and all that.

3 MR. MITCHELL: But that is the essence of
4 the concerns that is--as I understand it, the
5 concern that is underlying Professor Weiler's
6 question.

7 And so, as you review the 200 pages of
8 legal arguments, no one is sitting there saying
9 this is the ambit of Article 1110. This is the
10 ambit of Article 1105, or this is why these are or
11 are not investment measures. And you will recall
12 when we went through the previous proceedings as to
13 what was asking the United States to file a
14 statement of defense, and they reserved certain
15 questions, like does this fall within investment
16 measures.

17 PRESIDENT GAILLARD: I was referring to
18 the test with respect to 1901(3), and I think
19 Mr. Weiler was referring to that as well, not
20 prejudging anything on Chapter 11. For the test
21 you're saying it's not a jurisdictional bar;
22 therefore, you need to go into the merits. We

1 allege this, in and of itself, is not a bar, so you
2 need to go to the merits because the respondent has
3 reserved other arguments for a later stage. That's
4 your contention, I think; is that correct?

5 MR. MITCHELL: I think perhaps--I want to
6 be careful to make sure I get my response correct
7 here.

8 (Pause.)

9 MR. MITCHELL: Yes.

10 PRESIDENT GAILLARD: Thank you.

11 Professor Weiler.

12 ARBITRATOR WEILER: Just to restate to the
13 United States, if, in principle, should the panel
14 decide in principle there might be circumstances
15 where contrary to your argument, 1901(3) is not a
16 1901(3) is not a total bar, can all other issues
17 that pertain to jurisdiction, is it your
18 understanding, have been reserved for the merits
19 phase?

20 MR. CLODFELTER: One moment.

21 (Pause.)

22 PRESIDENT GAILLARD: Who is going to

1 answer?

2 MR. CLODFELTER: I will answer,
3 Mr. President. Let me begin by just referring the
4 Tribunal to Article 21(4) which is the presumption
5 in favor of deciding jurisdictional defenses as a
6 preliminary question. So if the question is,
7 should the Tribunal decide that without more it
8 cannot decide whether 1901(3) is a complete bar,
9 should the more be put off to the merits, we
10 would--we think we would oppose that because it
11 would violate the principle of preliminary
12 treatment of the jurisdictional issue. So, we
13 should not be put to the burden or the expense of
14 defending on the merits, especially on a
15 jurisdictional objection of this sort.

16 But we don't think--you asked earlier is
17 there a middle ground. We don't believe there is a
18 middle ground. We believe that you accept the
19 facts as alleged as true. You don't accept facts
20 that haven't been alleged as true, which seems to
21 be what we are hearing from the other side, that a
22 pattern of conduct and the whole range of conduct

1 they haven't even specified yet. What you have to
2 accept as true is the facts alleged in the
3 Statement of Claim. All those facts show that the
4 conduct is the basis of this claim is conduct in
5 the administration of the U.S. antidumping and
6 countervailing duty law. We think that is
7 sufficient to establish that the claim would have
8 obligations imposed by Chapter 11 on U.S.
9 antidumping and countervailing duty law, and should
10 therefore bar the claim in total.

11 The facts to be assumed true are the facts
12 alleged in the Statement of Claim, and we certainly
13 don't accept the theory of the claimant that
14 abusive administration of the AC/CVD (sic) law is
15 within your jurisdiction, but maybe not abusive
16 administration of that law isn't. That is, if the
17 officials acted wrongfully, you have jurisdiction
18 to decide if the officials have acted wrongfully.
19 We think that's crazy. You have to assume the
20 allegations in the Statement of Claim is true, and
21 in doing so it is sufficient to establish their
22 relationship to antidumping and countervailing duty

1 law.

2 I hope I have answered your question.

3 PRESIDENT GAILLARD: Thank you for this
4 clarification. We think the position of the
5 parties is rather clear, and we think the
6 discussion was helpful in this respect.

7 Now we would like to turn to a number of
8 questions which are questions of clarification
9 regarding the reply of respondent this morning.
10 Maybe I will start with or have a few questions.

11 Mr. Clodfelter, maybe you want to comment
12 on the answer which was made to your position
13 regarding the facts which would have taken place
14 after the notice. Your position as expressed
15 earlier was that since you have a notice
16 requirement here, the facts which take place
17 afterwards shouldn't be considered at all, and the
18 argument was made that if it's the same, the
19 continuation of the same pattern of facts, it
20 could, and some case law was quoted. Do you want
21 to answer this, or you want to just refer to your
22 written pleadings in this?

1 MR. CLODFELTER: Mr. President, one
2 person's pattern is another person's matrix. What
3 NAFTA requires is that claimants allege measures in
4 violation of--measures related to investments.
5 They have to specify the conduct.

6 Now, we are not in a position to tell you
7 how to define the limits because obviously facts
8 develop, and even a measure alleged develops over
9 time and changes over time, and tribunals have held
10 that such changes do not require initiation of a
11 separate claim or a separate notification. I'm not
12 going to give you a definition of what those
13 changes are.

14 And the other thing is, we have no idea of
15 this pattern that they're talking about, of course,
16 except what has been written in the briefs and in
17 the Statement of Claim. The subsequent conduct
18 they have alleged, however, is not merely the
19 earlier measures that they alleged developed over
20 time. We would not say, for example, that any
21 behavior which they seem to be now criticizing
22 before the Chapter 19 Panels, on reaction to

1 Chapter 19 Panel decisions is the same measure as
2 the complaints they have made about the
3 investigations, for example. That clearly is a
4 separate measure requiring separate notification
5 and pleading.

6 But we don't know even what the additional
7 measures are in this matrix pattern of facts is, so
8 our position is that nothing we have heard fits
9 within the latitude given on pled matters to be
10 added to a case, and we would oppose any
11 supplementation of the claim without compliance
12 with NAFTA's requirements.

13 PRESIDENT GAILLARD: Thank you.

14 Conrad, do you want to pick up?

15 ARBITRATOR HARPER: I don't know to whom I
16 should direct this--thank you, Mr. President--so
17 let me just ask generally of the U.S. side the
18 following. Canfor has alleged, I think, in
19 statements by both Professor Howse and by
20 Mr. Landry that what it seeks in this proceeding on
21 the merits would be damages as well as the return
22 of duties and maybe other things.

1 My question for the U.S. side is, what do
2 you understand Canfor's claim to be in respect of
3 what the NAFTA provides? Is it entitled, to put
4 the question differently, to collect damages,
5 return of duties, and the like in a Chapter 11
6 proceeding?

7 PRESIDENT GAILLARD: I think we know the
8 answer to that.

9 (Pause.)

10 MR. McNEILL: I think that there is no
11 dispute between the parties that the damages, as a
12 general matter, are available under Chapter 11, and
13 first thing there needs to be a finding of
14 liability portion, and of course there is the
15 assessment of damages, and damages certainly could
16 encompass a range of things: Lost profits, you
17 could even get attorneys' fees. There is not a
18 perfect overlap, if this addresses the Tribunal's
19 concern.

20 We are not saying that there is a perfect
21 overlap between the recovery they are seeking here
22 and the recovery they are seeking in Chapter 19.

1 But you heard Canfor say this morning that there is
2 now \$500 million worth of duties that they have
3 paid. That is a substantial sum that they are
4 requesting in both proceedings.

5 So, the point is that there is a
6 substantial overlap between the two proceedings,
7 not that there couldn't be some additional claim
8 for damages that they could conceivably make in
9 Chapter 11.

10 PRESIDENT GAILLARD: Joseph, do you wish
11 to ask a question?

12 ARBITRATOR WEILER: I beg your patience
13 and indulgence. Also my colleagues'. This might
14 be the last time we actually get a chance to
15 discuss this, so if I'm a bit plodding, I
16 apologize.

17 I think my first couple of questions will
18 be to Ms. Menaker, and they go to 1901(3) and to
19 1902, and I think we need to deal with both.
20 Because if I understood your position correctly, it
21 was they are not interdependent. In other words,
22 even the claim, the reference to antidumping law or

1 countervailing duty law, one argument was that it
2 doesn't refer to determinations or specific
3 decisions, and you contested that and said, no, it
4 should include all of that because that would be
5 part of administrative practices. But then if I
6 understood you correctly, you said but even if I'm
7 not right on this, they still are barred because
8 the duty to appear to justify would be in respect
9 of antidumping law.

10 So, since we might be buy one of your
11 arguments but not the other, I understand that they
12 stand alone, but I want to deal with each of them.

13 So, let me deal with the question of what
14 should be understood by antidumping law or
15 countervailing duty law, and for that we were led I
16 think by both sides to Article 1902 as part of
17 their argument, and there it is said that
18 antidumping law and countervailing duty law include
19 as appropriate for each party relevant statutes,
20 legislative history, regulations, administrative
21 practice, and judicial precedents.

22 If I understood the Canfor argument

1 correctly, they said this is all in the nature of
2 rules, normative, and I don't want to use the word
3 measures, but normative rules, and they should be
4 differentiated by specific determinations or
5 specific decisions which would not be covered by
6 law.

7 And if I understood your argument
8 correctly, Ms. Menaker, this is how you argued
9 before us. You said, first of all, we should look
10 at the word include, and include means it's not an
11 exhaustive list because if it was meant to be an
12 exhaustive list, you referred us to other places
13 where it says means. So, include could include
14 other things.

15 And then you tried to persuade us that
16 they include--could include also administrative
17 determinations or decision because that would be
18 part of administrative practice.

19 And if I recall correctly, this at least
20 is the note that I took when you were speaking, you
21 gave us an example. You said each branch of
22 government works in its own way. The legislature

1 issues statutes, and the judiciary issues judicial
2 decisions, and the Executive Branch issues
3 decisions and regulations which issues decisions or
4 determinations which are part of its administrative
5 practice.

6 The slight difficulty I have with this is
7 the following: First grant me, I think you would
8 that the fact that it says include, and it doesn't
9 mean that it's an exhaustive list, doesn't mean it
10 includes everything. For example, you might say it
11 includes also letters or correspondence that we
12 might say we are not persuaded about that.

13 So, the question is what is to be, even if
14 I buy, and I think I'm inclined to buy, although I
15 would like to ponder it more that it's a
16 nonexhaustive list, the question is what should be
17 included in addition or what should be understood
18 as administrative practice because one could argue
19 one or the other.

20 So, it's a matter of interpretation. Now,
21 what strikes me is the following, that you said the
22 legislature issues statutes, court issues decisions

1 but the text here refers to judicial precedents
2 which would seem to suggest that not every judicial
3 decision should be included, but only judicial
4 decisions which is are of a precedent-creating
5 nature. In other words, we might read it, and
6 that's the direction my question is going, that, in
7 fact, they say to us that antidumping law does not
8 include every judicial decision, but only
9 precedent-creating decisions, and that therefore,
10 mutatis mutandis, when we get to administrative
11 practice, we should look to the equivalent, it's
12 not all the output--you see the Legislative Branch
13 also issues nonbinding resolutions, you know,
14 proclaiming the twentieth of March as the Joseph
15 Weiler day, but it's the statutes, it's the
16 normative one you said. And for the courts it's
17 the judicial decisions, the judicial precedents,
18 and therefore we might want to look also for
19 administrative practice and to say either
20 administrative practice should include
21 determinations, but to the extent that they are the
22 equivalent of that normative behavior, in other

1 words, that they are of the rule nature and not the
2 specific application of the rule.

3 Now, my usual caveats apply. I don't know
4 yet how this will help, if it will help them, if it
5 will help you, et cetera, but I want to try and get
6 everything as much as possible out of the hearing,
7 and that's the sense of my question, the first
8 question.

9 MS. MENAKER: Mr. Weiler, first, I would
10 like to just clarify our position. I think that
11 what you said was correct in some respects, but I
12 would just like to clarify it. First, in 1901(3)
13 it uses the term antidumping law or countervailing
14 duty law. I would say that we could break our
15 argument down into three different levels. First,
16 on the first level, we would say that the
17 determinations, to the extent they're challenging
18 the determinations, that falls within the
19 definition of antidumping law or countervailing
20 duty law because anything done in the
21 administration or the application of a law, if
22 you're challenging the administration or

1 application of that law, you would be imposing an
2 obligation on a party with respect to that law.

3 Now, that is independent of our arguments
4 pertaining to the meaning of the term
5 administrative practice, so even if law just
6 referred to the statute on the books, that is still
7 our argument that that term is broad enough there
8 to encompass obligations that would be imposed on a
9 party with respect to the administration and the
10 application of that statute that would be--fall
11 within 1901(3).

12 Now, second, what we have said is the term
13 law, if you look at the definition in 1902(1), it
14 includes administrative practices, and we have said
15 that administrative practice one example of an
16 administrative practice is a determination, and on
17 that basis alone we would say that the term,
18 therefore determination fits within the meaning of
19 antidumping law or countervailing duty law.

20 And third, I would say that the list
21 there, the so-called definition is an open-ended
22 one, so to the extent that you found for one reason

1 or another that determination did not fit within
2 the definition of administrative practice, and then
3 we are asking you to look beyond this list and add
4 in determination, and that's where I think your
5 question comes in, is should we be adding a term
6 like that into the list if we think it serves a
7 purpose different from the other terms that are
8 listed there.

9 ARBITRATOR WEILER: It also applies to
10 your second argument, what should be included in
11 administrative practice, even if we don't include
12 anything else, because administrative practice is
13 pretty open textured. So my question actually
14 relates to both, the second and the third.

15 MS. MENAKER: I can certainly respect that
16 view, but I would also urge upon the Tribunal to
17 look at what we consider to be the ordinary meaning
18 of administrative practice, and I pointed to the
19 definition of that term, for instance, in the
20 financial services chapter of the Canada-U.S. Free
21 Trade Agreement, and I believe that that
22 definition, a determination, if, in the context of

1 a Federal agency that was administering the U.S.
2 trade laws, a determination would fit within that
3 definition. So, in our view, that would fit within
4 the ordinary meaning and would be dissimilar to the
5 other terms that were listed there. But
6 nevertheless--

7 ARBITRATOR WEILER: Wouldn't you say
8 that--I'm a great believer in looking at context
9 always--that wouldn't you say that the immediate
10 context is 1901, 1902(1) itself, and that in that
11 context since it spells out that for judicial
12 decisions it's not just all judicial decisions
13 which it could have been, but actually narrows it
14 down to judicial precedent that that's the
15 immediate context in which I should try and
16 construe administrative practice? And that would
17 take precedence over going to context which is a
18 different treaty from a different time which was
19 changed and not replicated here? I'm not trying to
20 be vexatious, so...

21 MS. MENAKER: Let me answer that in two
22 ways. First, I don't think that we completely

1 agree with your interpretation of the term judicial
2 precedent. I believe that every--in a common law
3 system you could have decisions that they all
4 create some sort of judicial precedent. It might
5 not be precedent for any particular case if the
6 decision is emanating from a court. It depends
7 where you are when you are looking at the body of
8 case law, but each decision, in and of itself,
9 might have some precedential value, depending on
10 where that court sits.

11 ARBITRATOR WEILER: Wouldn't then they say
12 judicial decisions? If they said judicial
13 precedents, doesn't that imply that they also
14 contemplate judicial decisions which are not
15 precedential?

16 MS. MENAKER: I do not necessarily think
17 so.

18 ARBITRATOR WEILER: I do not necessarily
19 think so, either.

20 MS. MENAKER: Okay, fair enough.

21 ARBITRATOR WEILER: But I'm clarifying.

22 MS. MENAKER: Sure.

1 I would also add, you know, our second
2 point is that administrative practice is different
3 from judicial practice in important respects, and
4 in the administration of the United States's
5 antidumping and countervailing duty laws, the
6 administrative practice is built up through the
7 issuance of the determinations, and so the
8 administrative practice is built upon each
9 determination.

10 I mean, typically a single determination
11 can represent administrative practice on a
12 multiplicity of different issues, and so in that
13 respect I think it is somewhat--it is akin to
14 something like judicial precedent there, that as
15 the determinations are issued, that is, I mean, in
16 essence the way that the administrative practice
17 develops.

18 ARBITRATOR WEILER: There might not--I
19 mean, Canfor didn't argue something totally
20 different from that. They invited the panel if I
21 understood them correctly to say if you look at
22 determination as part of a normative whole, then

1 that might be antidumping law. If you look at it
2 as stand-alone and there might be circumstances.

3 Can I move to my second question which
4 might also be of some consequence. It's a
5 different form of labeling. My professional
6 deformation, I'm a law professor, so I'm going to
7 set a hypothetical.

8 Imagine that a Chapter 19 Panel
9 characterized an official--an act of a national
10 administration, Canadian, American, or Mexican,
11 that caused injuries and damages to an investment
12 of an investor characterized as ultra vires. They
13 made a legal finding this is an ultra vires
14 measure; the official has no authority to do it.
15 It was outside his or her remit. If it were the
16 classroom, one could sort of shade it in different
17 way, but it's enough here.

18 Would the panel not be justified in
19 thinking that at least in relation to such a
20 measure so characterized, it might not be
21 considered as to be in respect of the parties'
22 antidumping law or countervailing duty law, having

1 been qualified that it is exactly not that?

2 And in a way, Mr. Clodfelter, that's a
3 question that indirectly also applies to what you
4 said today in relation to the President's different
5 question about labeling, because you, if I
6 understood you correctly, you said that if--it's a
7 different type of ultra vires. If there was a
8 measure which cloaked itself as antidumping but was
9 egregiously not so or at least appeared prima facie
10 appeared to be egregiously not so, then panels such
11 as ours would be allowed to make a determination.
12 In fact, if I understood you correctly, this is not
13 an antidumping measure, this is something that
14 pretends to be an antidumping measure, but also
15 there there is another instance where although
16 emanating because maybe it was issued by the
17 antidumping authorities, et cetera, so in some ways
18 related to antidumping law, it would still be
19 possible for a panel of us, by a panel of this
20 nature, at least to seize the matter in order to
21 decide it without contravening the stricture, even
22 as you understand it, of 1901(3). At least these

1 are circumstances where simply seizing the matter
2 in order to make a determination could not be
3 construed as imposing an obligation in relation to
4 antidumping law because that would be begging the
5 question where there is antidumping law.

6 MR. CLODFELTER: Let me begin our answer,
7 and Ms. Menaker may add something to it. I don't
8 think the two situations are the same, first of
9 all. The point I was trying to make just calling
10 it antidumping doesn't make it antidumping, and you
11 can look further than that, but an ultra vires act
12 is very different because if you're looking at the
13 context--

14 ARBITRATOR WEILER: Could we stop on the
15 first one, on the calling it?

16 MR. CLODFELTER: Sure.

17 ARBITRATOR WEILER: That might be
18 contested. In other words, the investor might say,
19 let's forget about the facts of Canfor for now
20 because I really think they might cloud the issue.
21 The investor might come in with a claim and say
22 with the claimant this is not antidumping or

1 countervailing. It's just pretending to be. That
2 was the example the President gave. And the state
3 would in good faith even vehemently say this is the
4 case, this is absolutely within antidumping. Who
5 gets to decide that to say that that would be
6 imposing--that submitting that to a panel such as
7 ours would violate, would mean that really it is
8 shielded, and you, yourself, concede, if I
9 understood you correctly, that there might be cases
10 where it really should be structured.

11 MR. CLODFELTER: Well, first of all, I
12 believe it's for the Tribunal to decide, but let me
13 make this point first of all. It's not an issue in
14 this case. It's been admitted that the conduct
15 here was in the administration of antidumping and
16 countervailing duty laws. It is not an issue
17 before you, and it need not trouble you in deciding
18 the effect of 1901(3) here.

19 ARBITRATOR WEILER: I think that would be
20 a matter for the panel to decide, wouldn't it,
21 whether everything that was alleged in the
22 statement of fact could be characterized in that

1 the administration of, et cetera, or not?

2 MR. CLODFELTER: Well, of course, of
3 course. What I'm saying is it's patently clear and
4 uncontested that everything, all the conduct they
5 allege you could maybe find a different conclusion
6 based upon your reading of the Statement of Claim,
7 but I think you won't.

8 And it's not being alleged that this is
9 just labeled as antidumping. This is clearly about
10 the U.S. administration and antidumping. They
11 don't like the way we administered it, but it's
12 clearly about that. So, the labeling issue really
13 isn't here in this case. The only labeling is on
14 the other side trying to label this as something
15 other than what it is, but it's different than the
16 ultra vires situation.

17 PRESIDENT GAILLARD: Can you finish on the
18 antidumping--on the labeling, I'm sorry. You say
19 it's not--it doesn't fit the facts of the case.
20 Now, that's one argument. What about the legal
21 argument? What's the test? You would agree with
22 the test, but you said it doesn't fit here, or do

1 you want to elaborate on the test? Being
2 understood that for the purposes of the Court
3 Reporter, we will break in five minutes because I'm
4 told that the nature of justice requires that.

5 MR. CLODFELTER: We will give him the
6 break, but let me just suggest here we may be
7 reluctant in the abstract to offer you a test since
8 it isn't an issue here we don't believe.

9 PRESIDENT GAILLARD: That's fine. I want
10 to hear your determination on this.

11 MR. CLODFELTER: Ultra vires, I think it's
12 different because even in an ultra vires act, the
13 conduct is still in the administration, perhaps, of
14 the underlying body of law. Maybe that person
15 didn't have authority to do it, but you could still
16 make a determination of what that conduct relates
17 to, and so I don't even think in an ultra vires
18 case if you determine that the conduct is in the
19 administration, authorized or not, of antidumping
20 or countervailing duty law, it can impose
21 obligations on it.

22 ARBITRATOR WEILER: Mr. President, I would

1 like to get to the bottom of this, with your
2 permission.

3 PRESIDENT GAILLARD: Of course. It's just
4 a question that we--can we go on. I'm asking the
5 Court Reporter if we can go on for a few minutes.

6 ARBITRATOR WEILER: I'm really trying to
7 think hard about this. We know, for example, from
8 the general law of state responsibility in
9 international law that it's a delicate issue
10 because sometimes government tried to escape the
11 state responsibility by saying a police officer
12 acted on a frolic of his own and outside his
13 authority, and this quite delicate law was in
14 uniform or was not in uniform, et cetera. But
15 what's interesting in the general law of
16 attribution and state responsibility, it's well to
17 accept the state's position that he or he were on a
18 frolic on their own and acting outside their
19 authority and acting ultra vires, the state would
20 escape its liability. So, international law
21 doesn't want an illegal act of being committed, and
22 the state escapes state responsibility by saying it

1 wasn't can't be attributed to us.

2 What's interesting here and different here
3 and that's why maybe in general law state
4 responsibility couldn't just apply directly is that
5 here by claiming this is state responsibility--we
6 are responsible, actually the state--the member
7 would escape its responsibility because it becomes
8 nonjusticiable then because then it's Chapter 19,
9 and there is no remedy under Chapter 19.

10 So my point on this point is that that's
11 why I'm taking with caution just the general law of
12 attribution under state responsibility.

13 So, now let's say that he or she are
14 acting--really the Chapter 19 Panel say this is
15 total totally outside what the antidumping law is,
16 they were frolicking on their own; let's say they
17 issued a claim for money pretending that this was
18 an official claim of antidumping and it turns out
19 they put it in their pocket, to give an absurd
20 example. So, at some level it's true to say that
21 this is related to antidumping, but would a
22 determination saying they suffered injury by doing

1 this is imposing an obligation on the antidumping
2 law of the state? Isn't that a little bit
3 far-fetched? It's not imposing an obligation on
4 the antidumping law of the state because the panel
5 or *mutatis mutandis*, if it were a domestic issue,
6 the Court of International Trade in New York would
7 have said it's not antidumping law of the United
8 States. It has nothing to do with antidumping law
9 of the United States. It's a violation of
10 the--it's *ultra vires*.

11 (Pause.)

12 MS. MENAKER: Perhaps it might make sense
13 if the panel, the Tribunal doesn't mind we take our
14 break now so we can collect our thoughts and then
15 answer.

16 PRESIDENT GAILLARD: I'm sure the Court
17 Reporter would find that to be a good idea, so
18 let's break for 15 minutes, then you answer, and of
19 course, claimant will be invited, if they want to,
20 to comment on your answer. So, for the record, we
21 pause for 15 minutes.

22 (Brief recess.)

1 PRESIDENT GAILLARD: We resume the
2 hearing, and Professor Weiler will continue his
3 line of questions.

4 ARBITRATOR WEILER: I was just waiting for
5 the reply of Ms. Menaker or Mr. Clodfelter, and
6 then I have the finish up question to Mr. McNeill.

7 MS. MENAKER: Thank you. Just if I may,
8 just before responding to that, I just wanted to
9 very briefly supplement a prior answer that I gave
10 concerning the definition of antidumping
11 countervailing duty law and its interaction with
12 the administrative practice and whether or not that
13 includes determinations, and I would just like to
14 direct the Tribunal's attention to the fact that
15 included amongst the things that are listed in
16 1902(1) as being within the antidumping law and
17 countervailing duty law is legislative history.
18 And legislative history certainly is not binding,
19 it's not precedential. It's not normative. So, in
20 that respect, I think, Professor Weiler, you
21 indicated some concern that a judicial precedent,
22 perhaps, should be construed rather narrowly

1 because not all judicial decision was included, and
2 judicial decisions that were not binding, for
3 instance, might not be included. And I think one
4 has to take into account that not all of the things
5 on that list are of a normative and certainly not
6 of a binding character, so I just wanted to
7 supplement my answer in that respect.

8 With regard to the question you asked us
9 before the break, which is, if in the
10 administration of our antidumping or countervailing
11 duty law, if an official acted in an ultra vires
12 manner, whether that conduct would still be not
13 subject to investor-state dispute resolution by
14 virtue of Article 1901(3), and first I would like
15 to just reemphasize that there is no allegation of
16 ultra vires conduct here. If one looks at Canfor's
17 Statement of Claim, its Notice of Arbitration
18 there, the conduct there all relates to the
19 administration and application of the United
20 States's antidumping and countervailing duty law,
21 and none of it could be characterized or fairly
22 characterized as ultra vires conduct.

1 Now, in the hypothetical that you gave,
2 there I believe in your hypothetical the conduct
3 that was at issue was, in fact, before a Chapter 19
4 Panel, and the Chapter 19 Panel in that instance
5 indicated that the official in question had acted
6 outside the realm of his or her responsibilities.
7 And I suspect, then, took some action, whether it
8 was a determination that that person was
9 responsible for having issued; perhaps the
10 determination was then remanded because of that.

11 I think in that situation there clearly
12 1901(3) would bar any other type of claim, an
13 investor-state claim, even presuming obviously the
14 other prerequisites for jurisdiction were met under
15 Chapter 11 because there exercising jurisdiction
16 over that claim would be imposing an obligation on
17 a party with respect to the administration and
18 application of its AD/CVD laws.

19 Now, by the same token, if there were
20 conduct and we have not come up with any example of
21 such conduct, but theoretically, if there were
22 conduct that was so ultra vires so as to be outside

1 of this sphere of antidumping or countervailing
2 duty law, then in the same manner as what
3 Mr. Clodfelter was saying earlier, for the same
4 reasons that merely labeling a law as an
5 antidumping or countervailing duty law, merely
6 labeling conduct or merely asserting that a certain
7 challenge would impose an obligation with respect
8 to your antidumping or countervailing duty law is
9 not enough, but that is precisely the question
10 before this Tribunal, and I think that previously
11 you asked what test do you apply, and I think I
12 would like to direct the Tribunal's attention to
13 footnote 16 in our reply where we quote the
14 separate opinion of Judge Coroma on the ICJ in the
15 Fisheries Jurisdiction cases, and I will just quote
16 from that. It says, since Canada excluded from the
17 jurisdiction of the court, quote, disputes arising
18 out of or concerning conservation and management
19 measures, end quote, the question whether the court
20 is entitled to exercise its jurisdiction must
21 depend on the subject matter. In other words, once
22 it is established that the dispute relates to the

1 subject matter defined or excluded in the
2 reservation, then the dispute is precluded from the
3 jurisdiction of the court, end quote.

4 And so, there too the ICJ was engaged in
5 an exercise where it had to determine the contours
6 of the claim and whether that claim was precluded
7 by an exclusion of jurisdiction, an exclusion from
8 the court's jurisdiction of a particular subject
9 matter. And that's what we are asking you to do
10 here, is to look at Canfor's claims as pled, and
11 reach the determination which we think is
12 inescapable, which is exercising jurisdiction over
13 those claims would impose obligations on us with
14 respect to our antidumping and countervailing duty
15 law.

16 And I think the bottom line is really, is
17 that obligation, with respect to the AD/CVD law?
18 It either is or is not, and regardless of how
19 allegedly egregiously that law was administered or
20 it was applied does not change the fact that then
21 imposing an obligation with respect to the
22 administration or conduct of that law would still

1 be in violation of Article 1901(3). It does not
2 make the conduct that was undertaken any less--it
3 does not make it--excuse me, I don't want to use
4 too many double negatives in that sentence.

5 The obligation on the United States would
6 still be with respect to its antidumping and
7 countervailing duty law, even if that law had been
8 improperly applied, and I think I mentioned when I
9 did my argument yesterday--I mean, that is
10 precisely what the Chapter 19 Panel system was
11 devised to hear, is to hear the questions of
12 whether the law had been properly applied.

13 Now, if your concern is that there might
14 arise a situation where there is no remedy, I would
15 like to at least address that, to some extent,
16 because if the issue that you're asking us about is
17 whether if in the administration and application of
18 the law one of the government agencies acted
19 improperly, they ignored the law, they manifestly
20 disregarded the law, that, again, does not leave
21 anybody with our outer remedy. That is the precise
22 reason that the parties created the Chapter 19

1 mechanism. The Chapter 19 binational panel in that
2 case, would there--in that situation would remand
3 any determination because they would find that it
4 wasn't made in accordance with U.S. law.

5 Or if a claimant did not opt to utilize
6 that system, they could go to the U.S. court
7 system.

8 ARBITRATOR WEILER: Can I ask you about
9 that.

10 MS. MENAKER: Yes.

11 And it is really by way of clarification.
12 But when we say no remedy, what troubles us is not
13 that there is no remedy in the formal sense because
14 if it goes before Chapter 19, they can remand it.
15 Let's say the national administration, and again I
16 say it's maybe best to set Canfor aside for a
17 minute, although I really take your point that it
18 depends what is pled here, et cetera.

19 I think the notion of no remedies, that
20 there is no remedy to the injuries suffered by the
21 egregiously improper behavior is simply remanding
22 it back even if they then issue a right decision or

1 they don't.

2 What we might be concerned--since we have
3 to construe it, I know the United States is arguing
4 that this is crystal clear and if you only open
5 your eyes how could you even be sitting here, but
6 we are. So, maybe some of us take the view that
7 it's not quite as crystal clear as you would have
8 us believe.

9 So, it's a question of interpretation, and
10 we might be concerned to give an interpretation
11 that would really open a gap in the protection
12 which we appropriately think that NAFTA wants to
13 afford to investors, Canadian, American, and
14 Mexicans, so that an empty remedy like an
15 exhaustion of local remedy rule, if it's just
16 formal but it doesn't get a remedy, maybe it's that
17 kind of remedy that we might be concerned with.

18 And really in situations where you could
19 say they're acting outside the law, with blatant
20 disregard of the law, not simply the kind of normal
21 kind of error that everybody is prone to make,
22 including this panel.

1 MS. MENAKER: I do understand the concern,
2 and first there is in the hypotheticals or in a
3 hypothetical that you posed, there might, for
4 instance, be the remedy of a criminal sanction. If
5 what the conduct that was undertaken was so
6 egregious and it might have violated criminal law.
7 So, that is another potential remedy.

8 They might also have a civil remedy in the
9 form of what we call a Bivens action against the
10 particular official if that official acted outside
11 the scope of his or her authority. And they might
12 have an action in U.S. court, and could receive a
13 remedy in that manner.

14 But, even if one could conceive of a
15 situation where an antidumping and countervailing
16 duty matter that was properly before a Chapter 19
17 Panel, so fell within the restriction of Article
18 1901(3), even if one could conceive of a situation
19 where conduct arising in the course of that matter
20 could give rise to a Chapter 11 claim, if the
21 Tribunal only had jurisdiction, that is not a
22 reason for finding jurisdiction. The fact that you

1 might have a customary international law right does
2 not necessarily grant you a remedy, and does not
3 necessarily make--

4 ARBITRATOR WEILER: That's not exactly the
5 point. Of course that alone would not give rise to
6 jurisdiction. We are not going to rewrite the
7 Treaty just because we think the makers of the
8 Treaty in certain situation left an investor
9 remedy-less, but the question we at least I
10 personally find difficult is whether the bar to
11 Chapter 11 which is not imposing an obligation on
12 antidumping law of a member should operate there
13 because of the way I tried to construe the problem
14 and then exemplified it with a hypothetical, it
15 would be difficult to say this is actually imposing
16 an obligation on the antidumping law because it's
17 really not on the antidumping law. That's the
18 kernel, and maybe that's where you and I are not
19 quite *** adidum.

20 PRESIDENT GAILLARD: Is it that your
21 determination on the U.S. side that the--what the
22 authorities do may be right or wrong, but it has to

1 be genuinely within the ambit of antidumping and,
2 I'm sorry, or countervailing duty law to be
3 excluded of the jurisdiction of the Chapter 11
4 Tribunal? I've added the word "genuinely." And
5 would you agree that that kind of test is what you
6 have in mind?

7 And of course, we understand that you're
8 saying it's not the case here, but it's a different
9 issue. We are talking about the law now.

10 MS. MENAKER: Yes, I think, Mr. President,
11 that that would be a fair description, which is,
12 and just to make sure that I understood your
13 comment correctly, that is if what the official
14 did--

15 (Pause.)

16 MS. MENAKER: If what the official did was
17 genuinely within the ambit of antidumping and
18 countervailing duty law, although he performed his
19 function improperly, he did something wrong in
20 actually administering those laws, then, yes, that
21 would still be conduct with respect to our
22 antidumping and countervailing duty law.

1 I think perhaps, Professor Weiler, the
2 question you asked might also be--I mean be
3 answered by reference to my earlier comment which
4 is if the act itself was truly ultra vires that it
5 took it outside of the realm of what is antidumping
6 and countervailing duty law, then Article 1901(3)
7 might--

8 ARBITRATOR WEILER: I can' be a little bit
9 more nuanced. I'm really very tentative. One
10 approach is to say if it's so inappropriate as to
11 take it outside the realm, and I think you're not
12 to worry to concede to that because it really would
13 have to be extraordinary. It's a little bit like
14 Mr. Clodfelter, sort of if it's totally, you know,
15 really labeling, but the more difficult to touch
16 issue is whether it is of such a nature that
17 whatever remedy was indicated could not be a in
18 meaningful way be said to be impose an obligation
19 in relation to antidumping law because what was
20 done, one would really have to find that it imposed
21 an obligation in relation to antidumping law, and
22 what was done, that might be a more delicate issue

1 rather than that it's totally outside the realm,
2 but does whatever remedy a Chapter 11 Tribunal
3 would impose, could it be said in relation to
4 certain types of conduct to actually impose an
5 obligation on antidumping law?

6 And I suppose it could say--you could say,
7 okay, merely appearing before Tribunal is imposing
8 an obligation, but there we already saw that
9 sometimes in cases like somebody has to decide
10 whether it's here or there.

11 (Pause.)

12 MS. MENAKER: I will try to answer this
13 question. The best that I can say is really
14 reiterating what I had earlier answered, but
15 perhaps doing so in a different format may make it
16 more clear, is that certainly if the conduct at
17 issue again did not relate to antidumping and
18 countervailing duty law, although it was labeled as
19 such, but that was just purely a label, the act was
20 so ultra vires, then imposing an obligation on a
21 party to compensate for that conduct would not be
22 akin to imposing an obligation on a party with

1 respect to its antidumping or countervailing duty
2 law.

3 However, if the conduct cannot be taken
4 outside of that realm, that sphere, so if the
5 conduct was still undertaken in the administration,
6 the application of the antidumping and
7 countervailing duty law, then any obligation, even
8 if it was improperly taken, even if it was very bad
9 conduct, any obligation imposed on a party to
10 compensate an individual for that--any harm that it
11 suffered as a result of that conduct still would be
12 an imposition of an obligation on a party with
13 respect to its antidumping and countervailing duty
14 law.

15 PRESIDENT GAILLARD: Thank you.

16 ARBITRATOR WEILER: I want to assure you
17 that I really think I understand your position.

18 MS. MENAKER: Thank you, and I would only
19 just add that, of course, in the absence of even a
20 more concrete hypothetical, of course it's
21 difficult to answer these questions just
22 theoretically.

1 PRESIDENT GAILLARD: Thank you for having
2 tried to do so. We understand the position.

3 At this point, does claimant want to say
4 something? We understand that you disagree and you
5 have expressed views on this, but do you want to
6 make a comment or two?

7 MR. LANDRY: We do want to make one
8 comment, and just to follow up on that, obviously
9 the conclusion that Ms. Menaker comes to,
10 therefore, is that there will be instances under
11 their interpretation where there will not be a
12 remedy in the sense of what Professor Weiler was
13 getting at, that is the injury to potential to
14 foreign investors. But I want to go just beyond
15 that a little bit, and I've spoken to Professor
16 Howse about something that we talked about earlier
17 that I was going to get him to respond to when he
18 was away, and it deals with this remedy issue, so I
19 wonder if perhaps Professor Howse could comment on
20 that. It is in response to this.

21 PRESIDENT GAILLARD: In that case, you
22 may.

1 Professor Howse.

2 PROFESSOR HOWSE: We have, Mr. President,
3 several responses on this issue of the
4 quote-unquote realm of antidumping and
5 countervailing duty law.

6 To be very brief, the first, and I think
7 perhaps the most important point is that in
8 assessing whether the conduct that Canfor has
9 complained of is within the realm of countervailing
10 or antidumping duty law, whatever--I think that we
11 have to understand that Canfor's claim is both with
12 respect to individual acts of United States
13 officials that we see, we allege are falling below
14 the standard of treatment required by Chapter 11
15 provisions, but also it's very much a claim about
16 the conduct as a whole in this matter towards
17 Canfor.

18 And we have to look at and understand
19 whether the nature of the conduct, as a whole, and
20 here, if I may, I would just like to cite a very
21 recent NAFTA investor-state ruling, the GAMI and
22 Mexico ruling. I realize it's not in the

1 authorities, but we would be obviously prepared to
2 provide copies to the Tribunal and to the United
3 States. May I refer?

4 PRESIDENT GAILLARD: It's not necessary.
5 I think it's in the public domain. You may make a
6 comment. We don't want copies. We have access to
7 it.

8 PROFESSOR HOWSE: Sure. Thank you.

9 And in paragraph 97, the Tribunal makes
10 the following statement. The record as a whole,
11 not isolated events, determines whether there has
12 been a breach of international law, and so this may
13 also perhaps answer some of the concerns that
14 Mr. Harper has raised, that we are looking here not
15 just at discrete acts as violations, but a pattern
16 of conduct over a period of time where those acts,
17 put together, rise to the level of egregious and,
18 in our submission, improperly motivated conduct.
19 And so, there is part of our claim that says that
20 the collectivity of these acts represents a
21 violation, and I just wanted to make that clear.
22 That being said, I would just like to make

1 a couple of other observations on just this
2 particular--this particular issue. I think in
3 assessing the nature of the conduct and its
4 relationship to good faith or proper administration
5 of countervailing and antidumping duty laws and how
6 far it is out of that ballpark, as it were, first
7 of all, as we say, we have to take the conduct as a
8 whole over all these various iterations where there
9 have been numerous attempts both the WTO and in
10 other NAFTA proceedings to correct these problems,
11 and then we come to, and I would just like to
12 briefly quote, the second remand Decision of the
13 Panel in the injury case in August 31st, 2004,
14 which is in the authorities. That's at Tab 1 in
15 the authorities, and I think this is directly
16 relevant to the question of a remedy, and the
17 nature of the remedy that is or is not available or
18 has been denied, even if it's theoretically
19 available to Canfor in this case.

20 On page three, the binational panel makes
21 the following observation. In its second remand
22 determination, the ITC has refused to follow the

1 instructions in the first panel remand decision.

2 And note the language refused, refused to follow
3 the instructions.

4 And then the panel goes on to say the
5 Commission relies on the same record evidence that
6 the panel not once, but twice before held
7 insufficient as a matter of law to support the
8 Commission's affirmative threat finding. By the
9 Commission so doing, this panel can reasonably
10 conclude that there is no other evidence to support
11 the Commission's affirmative threat determination.
12 The Commission has made it abundantly clear to this
13 panel it is simply willing to accept this panel's
14 review authority under Chapter 19. Simply
15 unwilling to accept this panel's review authority
16 under Chapter 19. And has consistently ignored the
17 authority of this panel.

18 And the panel I'm quoting from goes on to
19 say, in light of this, further remands for
20 correction are futile, that essentially that there
21 is no point in making further remands because
22 whenever there is a remand to correct these errors,

1 the ITC simply refuses to accept the instructions
2 of the Chapter 19 Panel.

3 And it's our submission that this reflects
4 the very extraordinary nature of this particular
5 case that, essentially it would be very hard to
6 characterize in these circumstances the Chapter 19
7 proceeding as an effective remedy, or, indeed, the
8 conduct of Commerce is with respect to
9 countervailing and antidumping duty law, conduct
10 that simply refuses to follow a ruling that the ITC
11 is legally obliged to follow, refuses. Not
12 reinterprets what the panel is saying, but refuses
13 to follow, refuses the authority.

14 As in our submission, outside any
15 authority granted in respect of antidumping and
16 countervailing duty laws.

17 PRESIDENT GAILLARD: Professor Howse, you
18 have used different phrases or different concepts.
19 You have used the concept of good faith, proper
20 administration, and extraordinary nature of the
21 case. We understand your side's position that they
22 are prepared to concede that there are situations

1 which do not--which are not barred by 1901(3), and
2 they have expressed their views on this. It's the
3 genuinely, with respect, too, I would say that's
4 their position as I understand it, in a nutshell.
5 Your position would be that's the wrong test. The
6 real test is in good faith with respect to or in
7 the ordinary conduct of things as opposed to the
8 extraordinary nature of the case.

9 So, what is the test, as far as you are
10 concerned? Suggest a legal position. I'm not
11 talking about the facts of the case. I'm talking
12 about the legal standard.

13 PROFESSOR HOWSE: The legal standard,
14 Mr. President, that we urge on the Tribunal stems
15 from our interpretation of 1901(3) in context. And
16 that interpretation is that 1901(3) simply properly
17 read in context is not of the nature of a bar to
18 jurisdiction, and so it is our view that as far as
19 the correct test goes, that would be really a test
20 that would apply in a situation where there was an
21 attempt to argue 1901(3) as an interpretive
22 provision on the merits.

1 At the same time, we would argue, I
2 suppose, in the alternative or in response to what
3 the United States has said that were there a
4 different kind of test, were the panel to accept
5 the submission that there is some test that says
6 that you can go to Chapter 11 consistent with
7 1901(3), if the conduct in question somehow is
8 outside of the normal operation, authority, good
9 faith administration, that, in our view, the
10 conduct here collectively and in some cases
11 individually would meet such a test.

12 But I grant you that the test had not been
13 sufficiently clearly articulated. We just want to
14 make it clear that we are not in any way suggesting
15 that we think that the conduct we are complaining
16 of would be such that it could be characterized as
17 properly falling within the administration or as
18 non-ultra vires.

19 PRESIDENT GAILLARD: We understand your
20 primary, what you just referred to as your primary
21 case, and it has been discussed extensively, I
22 don't think we need to dwell on that, but we do

1 understand the argument.

2 What you're calling your alternative case,
3 the test would be that it has to be properly--can
4 you elaborate on that. Or just before elaborating,
5 just giving us the answer, what is the test in your
6 fallback position, if I may call it this way?

7 PROFESSOR HOWSE: If I could confer for a
8 moment with my colleague.

9 PRESIDENT GAILLARD: Please do.

10 (Pause.)

11 PROFESSOR HOWSE: Mr. President, because
12 we would like to look more carefully at the exact
13 words that the U.S. has suggested in terms of a
14 test for ultra vires or a test for something being
15 completely or outside AD and CVD law by virtue of
16 the extraordinary nature of the conduct in
17 question, and because in a sense, we have heard
18 several possible tests formulated in slightly
19 different language, in fully articulating, as you
20 put it, alternative position, we would like the
21 time to reflect on that, and look at the words
22 because I don't think we yet have a completely

1 clear test. My concern was simply to respond to
2 the way that they chose to characterize the conduct
3 we were--we are complaining of as it were en
4 passant in discussing their test, but frankly their
5 test, we would need to go back and look at the
6 words to see exactly the nature of that test, and
7 if there is one clear test they're proposing, and
8 then be back to you. Would that be satisfactory?

9 PRESIDENT GAILLARD: Well, this case is
10 not new to you. I guess you had ample time to
11 think about the issues, and you do not necessarily
12 have to have a fallback position. I was just
13 suggesting that--I mean, I was not suggesting
14 anything. I was commenting on the fact that on the
15 U.S. side when discussing the exact scope and
16 consequences of 1901(3), they say look, this
17 example of the something which is mere labeling is
18 not leading anywhere because we would agree that
19 mere labeling is not good enough, so it would not
20 work in a case as a bar in a case where it's mere
21 labeling, and they elaborated a little bit on that.
22 I'm not saying you--if that's all you can say at

1 this stage on this, that's fine. And we will
2 reflect on the suggestion that you may want to
3 think about it further, and will take that into
4 consideration at a later stage.

5 But Mr. Howse, we certainly understand
6 that your primary case, and your case, period, is
7 that it's not a bar because it's an interpretive
8 provision, and you have made this argument very
9 clearly.

10 MR. LANDRY: If I may, I think what we
11 would like to do is, because you have asked for a
12 test, and a type of test like this, I think there
13 is a preciseness in the words. We will provide the
14 Tribunal today with what that would be. I think
15 that's what we are saying. We just need a bit of
16 time. We will do it and reflect on it and we'll
17 provide that to the Tribunal.

18 PRESIDENT GAILLARD: This is perfectly
19 fine. You understand my concern. We are at the
20 hearing phase, and I don't want to unnecessarily
21 burden the case at this stage, but if that's what
22 you mean like you will come back to us during the

1 course of today, that's certainly fine.

2 PROFESSOR HOWSE: If I could just,
3 Mr. President, explain why we need to do this.

4 PRESIDENT GAILLARD: It's fine.

5 On the same issue, Mr. Harper still has a
6 question.

7 ARBITRATOR HARPER: Thank you,
8 Mr. President. This question grows out of your
9 words a few minutes ago, Professor Howse, and
10 actually I think relates to the entirety of the
11 Canfor position, so anyone is open to answer it,
12 obviously, but I will direct it to you, if I may,
13 sir.

14 Would you specify for the Tribunal one
15 act, and by specify I mean tell us what it actually
16 was, one act, of which Canfor complains in which it
17 is alleged that the U.S. official did something
18 that was not related to U.S. antidumping law and
19 countervailing duty law.

20 (Pause.)

21 PROFESSOR HOWSE: Well, it is Canfor's
22 claim that those acts that individually and

1 collectively manifest again on the evidence that we
2 intend to present in our view improper purpose, a
3 purpose other than--the purpose that's stated in
4 Chapter 19 itself of maintaining effective and fair
5 disciplines and unfair trade practices. But
6 rather, as we put it, purposes that are politically
7 motivated and not related to the impartial
8 enforcement of the law, but compromise that, that
9 those actions--it's hard to see them as relating to
10 countervailing and antidumping law, in our
11 submission, because they are motivated and driven
12 by considerations and purposes that are other than
13 as is stated in Article 1902(2), maintaining
14 effective and fair disciplines and unfair trade
15 practices.

16 ARBITRATOR HARPER: What I meant,
17 Professor Howse, was not to be given conclusory
18 statements or characterizing statements. What I
19 meant by the word specify, what I meant by saying
20 tell us the facts what it was. I'm asking for a
21 description, a statement of a single act of which
22 Canfor complains in this case in the jurisdictional

1 phase, a single act by a U.S. official that was not
2 related to U.S. antidumping and countervailing duty
3 laws.

4 PROFESSOR HOWSE: Well, Mr. Harper, with
5 all due respect, and at the risk of repetition, my
6 purpose in referring back to the second remand
7 decision of the Panel was to give you one
8 illustration of a moment in the ongoing conduct
9 that Canfor considers not in relation to or respect
10 to antidumping and countervailing duty law, and
11 that is as the panel held the persistent refusal of
12 the ITC to follow--refusal, not that they didn't do
13 it in the way the panel liked, but refusal to
14 follow the remand instructions of the Chapter 19
15 Panel.

16 Now, as far as we know, and as far as the
17 law says, they're obligated to do that. Their
18 whole purpose in a determination on remand is to
19 follow the instructions of the remanding authority.
20 That's what--

21 PRESIDENT GAILLARD: Your answer in a
22 nutshell is the conduct described in the second

1 decision of August 31, '04?

2 PROFESSOR HOWSE: That would be one
3 example, sir.

4 PRESIDENT GAILLARD: Thank you.

5 ARBITRATOR HARPER: And I understand that
6 you're saying that in light of the fact that a
7 Chapter 19 binational panel, by definition, deals
8 with antidumping and countervailing duty law? I
9 mean, that's what its subject matter is, is it not?

10 PROFESSOR HOWSE: Mr. Harper, what I was
11 saying is that the very nature of a remand where
12 the ITC is having a remand, the very--the nature of
13 that exercise in relation to countervailing and
14 antidumping duty laws is the redetermination of the
15 matter in accordance with the instructions of the
16 remanding authority.

17 So, where the ITC is refusing to follow
18 that, it's actually doing something other than a
19 remand in an antidumping and CVD proceeding. It's
20 essentially rejecting authority to which it is
21 legally bound in the context of antidumping and
22 countervailing duty law, and it's our submission

1 that that just goes way outside of the ambit of
2 action that could be reasonably and appropriately
3 considered to be in respect of antidumping and
4 countervailing duty law.

5 PRESIDENT GAILLARD: Thank you, Professor
6 Howse. I think we understand the argument. Thank
7 you for the clarification.

8 At this stage, unless respondent would
9 like to briefly comment on this, I would like to
10 move on to another topic, but if you do want to
11 briefly comment on this, please do.

12 MS. MENAKER: If we may just very briefly.

13 PRESIDENT GAILLARD: Please.

14 MR. McNEILL: Canfor's counsel says this
15 is an extraordinary case, there is something really
16 extraordinary about this case, but what is really
17 truly extraordinary is the only example of
18 something they can come up with which they say is
19 not with respect to antidumping and countervailing
20 duty law is something which is not even pled as a
21 basis of their claim. It is the actions of the
22 U.S. domestic agencies in response to the remand

1 determinations by the Chapter 19 Panels.

2 Now, it's hard to understand how that
3 could not be with respect to antidumping and
4 countervailing duty laws. As a matter of fact,
5 that is with respect to Chapter 19 as reflected the
6 entire process in Chapter 19. So it's very hard to
7 understand that claim.

8 Also, as a factual matter, the quotes that
9 Professor Howse read have really been overtaken by
10 events. He's reading from old--he's reading old
11 events. As I mentioned this morning, there was a
12 remand determination on August 31st, 2004, the
13 Chapter 19 panel issued the third remand
14 determination.

15 And the ITC made a negative threat
16 finding. So Professor Howse is referring to events
17 that occurred before this, so they have really been
18 overtaken by events entirely.

19 But perhaps the largest point on this
20 issue is that it has nothing to do with the
21 jurisdiction of this Tribunal at this issue.
22 Canfor is frustrated with the Chapter 19 process,

1 that they're unhappy with preliminary outcomes, not
2 even the final outcome, they're talking about
3 preliminary outcomes, is not something that would
4 confer jurisdiction on this Tribunal.

5 PRESIDENT GAILLARD: Thank you.

6 Mr. McNeill. If the parties are in agreement, we
7 would like to move to another topic at this stage
8 of an entirely different nature. We would like to
9 discuss the legislative history, the travaux with
10 respect to 1901(3), and we would have a number of
11 questions on the documents which were produced in
12 this respect.

13 In order to ask the questions, I would
14 like the parties to take the two binders which were
15 produced as negotiating texts of the chapter on
16 review and dispute settlement and antidumping and
17 countervailing duty matters of the NAFTA,
18 maintained by Canada and distributed to Mexico and
19 the U.S. And there is a reference number. The
20 first page has a page number which is 01139, and
21 each page has a page number going forward.

22 Can you take these documents before we ask

1 the questions, on each side, please. Do you have
2 them handy? Take your time.

3 MR. MITCHELL: We do not. We are going to
4 need to find one.

5 PRESIDENT GAILLARD: Please.

6 (Pause.)

7 PRESIDENT GAILLARD: It's an April 9
8 submission, April 9, '04,

9 PRESIDENT GAILLARD: We resume the
10 hearing. And I see that both parties now have in
11 front of them the documents which I referred to,
12 and I would like you to take the first tab, Tab 1
13 in this document, and go to the page two, where you
14 have on top of the page a paragraph which says USA
15 three, "No provision of any other chapter of this
16 agreement shall be construed as imposing
17 obligations on the parties with respect to the
18 parties' antidumping law or countervailing duty
19 law."

20 My first question on this is a question
21 for clarification. The word USA means that it's a
22 proposal by the USA. That's what the legend says.

1 I guess--is it correct?

2 MR. McNEILL: That is my understanding as
3 well. It says USA and the United States first
4 introduced that text, and it is in brackets and
5 underlined because it has not been accepted as of
6 that time.

7 PRESIDENT GAILLARD: That was my second
8 question. When it's in brackets, it means that it
9 hasn't been discussed yet, so it's a proposal.

10 MR. McNEILL: It's my understanding it has
11 been discussed. It's been put in the text, but it
12 has not been definitively accepted at that time.
13 It's still considered tentative or proposed text at
14 that time.

15 PRESIDENT GAILLARD: Right. So, do we
16 have anywhere in the record anything which tells us
17 when this proposal was introduced by the U.S.?
18 Earlier than this document which is Tab 1, or maybe
19 you can identify the date of the document, and then
20 answer the question.

21 MR. McNEILL: Not to our knowledge. The
22 first record we have of it is dated June 30th,

1 1992, which the first--I'm sorry, June 3rd, 1992.

2 It's the first draft of what's been called the
3 rolling text, and I could give you some background
4 on how that process worked, if you wish to hear
5 that.

6 PRESIDENT GAILLARD: Maybe you can give us
7 a word of background and then answer my question
8 which is, is there any document in your files which
9 predates that, or is it the first time this
10 language was introduced, to your knowledge?

11 MR. MCNEILL: As far as we are aware, this
12 was the first time the language was introduced.
13 Generally, the--Canada acted as the informal
14 Secretariat for this process, and there were
15 different northing rounds, and the negotiating
16 teams for each of the three NAFTA parties would get
17 together and have a negotiating session. At the
18 end of the session, they would have one text that
19 was the tentative text they had produced at the end
20 of that session, and Canada kept an ongoing record
21 of this process, and that's what each of these
22 drafts reflect.

1 PRESIDENT GAILLARD: So, the position of
2 respondent in this case is that this is the first
3 time in the travaux this language appears, to your
4 knowledge?

5 (Pause.)

6 MR. McNEILL: This is the first piece of
7 travaux preparatoire that we have found. We are
8 not aware of any documents that predate the June
9 3rd document that would indicate who originally
10 came up with the idea for this provision.

11 PRESIDENT GAILLARD: Travaux preparatoire
12 as opposed to what? Because you seemed to use it
13 in a narrower sense? So, what else there is, if
14 anything?

15 MR. McNEILL: In response to the
16 Tribunal's order, we conducted an extensive search
17 for documents that were shared between the three
18 parties, as we were requested to do. We did not
19 find any documents that fit that description that
20 predated this June 3rd document. Nor did we find
21 any other documents that did not fit that
22 description that bore any--that were related at all

1 to this provision. This is the first appearance
2 that we are aware of this provision; to the best of
3 my knowledge.

4 PRESIDENT GAILLARD: By way of background,
5 you wanted to elaborate on the methodology of the
6 negotiation, or have you already covered that, to
7 the extent you wanted to cover it?

8 MR. McNEILL: I covered it.

9 PRESIDENT GAILLARD: You have nothing to
10 add on that?

11 MR. McNEILL: No, I don't.

12 ARBITRATOR WEILER: Is there a record of
13 the discussion other than the final--this made it
14 into the text, and you indicated there must have
15 been some discussion, et cetera. Is there any
16 record of that discussion like we have here, this
17 kind of thing?

18 MR. McNEILL: No, not that I'm aware of.

19 PRESIDENT GAILLARD: So, all we can
20 understand from this text is that that language was
21 introduced presumably by the U.S.?

22 THE WITNESS: I think that's a fair

1 inference from the inclusion of the USA next to the
2 text.

3 PRESIDENT GAILLARD: Then if you go on and
4 if you look at the various drafts, and of course
5 the same section, tracking the language, you
6 find--but I'm stating something, and I want you to
7 correct me if I'm wrong because I want to test my
8 understanding against yours. Of course you're more
9 informed.

10 So, you see that that language--you find
11 that language reproduced in the same form with
12 still in square brackets, so it has not been
13 discussed, and we see it for some time. And then
14 the language varies a little bit. For instance,
15 you see on Tab 3 the document--I'm sorry, this is
16 still the same language, and then you can track it.
17 And at some point you see, for instance, at Tab 6
18 that the square brackets have been eliminated.
19 What does that mean?

20 MR. McNEILL: I assume it means it was
21 accepted by the other parties and they agreed that
22 that would be--that they didn't need to go back and

1 revisit that text, that they had agreed to that
2 portion of the text.

3 PRESIDENT GAILLARD: So if you place
4 yourself on August 6, 1992, which is the date of
5 the document at Tab 6, is your answer the same as
6 before, that there are no other documents shared by
7 among the parties, which is--which was our
8 question? Which discussed--there is no record of
9 any discussion on why it was adopted, or was it
10 discussed and parties saying no, I don't want it,
11 or yes, whatever, or we want a different language
12 or something like that. You found absolutely
13 nothing; is that correct? I assume that's right
14 because, if not, you would have produced it, I
15 guess.

16 MR. MCNEILL: That's right. The
17 Tribunal's order required the United States to
18 produce documents that were shared between the
19 parties that would reflect the common intent of the
20 three parties. We did not find any documents that
21 bore on the--on this provision that fit that
22 description, nor did we find other documents

1 outside that description, either.

2 PRESIDENT GAILLARD: Outside that
3 description. I'm not asking to turn those
4 documents in, that's not my question, just to
5 understand. Outside that description you would say
6 that internal memos like even that you have not
7 found?

8 MR. McNEILL: No.

9 PRESIDENT GAILLARD: Not that we request
10 it, but you have not found any such documents, like
11 internal memos and the U.S. administration saying
12 why is that? And so on. So you have not--

13 MR. McNEILL: You're referring to a
14 document that bears directly on 1901(3).

15 PRESIDENT GAILLARD: Bears directly on the
16 predecessor--the numbers have changed, but the
17 predecessor of 1901(3).

18 MR. McNEILL: No, we have not seen such a
19 document.

20 PRESIDENT GAILLARD: All right. And when
21 you said discussed with the parties, did you
22 include discussed among two of the parties if

1 that's the case? Have you found documents which
2 would have been discussed among two of the parties,
3 maybe not the third one? On the same topic, of
4 course.

5 MR. McNEILL: Right. My understanding is
6 in order to reflect the intent of all the NAFTA
7 parties, it would be a document that would be
8 shared among the three of them.

9 PRESIDENT GAILLARD: That I understand,
10 but that's not my question.

11 MR. McNEILL: But no, we didn't find
12 documents either that were shared among two of the
13 parties. When I say among the parties, that would
14 cover among two or among more.

15 PRESIDENT GAILLARD: So, your answer is,
16 no, there are no documents which would have been
17 shared among two of the parties discussing it at
18 the third one, but for reason, and the answer would
19 have been the same.

20 MR. McNEILL: That's correct.

21 PRESIDENT GAILLARD: It would have been
22 shared among two or more of the parties, the answer

1 would have been the same pursuant to the document
2 request?

3 MR. McNEILL: That's right.

4 PRESIDENT GAILLARD: Okay. Then you see
5 the text being carried in subsequent drafts, okay,
6 and then if you go to Tab 6--I'm sorry, 9, a
7 document of August 25, 1992, some language has been
8 added, with the exception of the entry into force
9 provisions of Article blank.

10 So, can you comment on that, what does
11 that mean? Ms. Menaker.

12 MS. MENAKER: I think that simply just
13 indicates that at that negotiation all of the
14 parties agreed to add those additional words in.

15 So, during--you start with the draft from
16 the last negotiation, if any party introduces
17 language that the other parties don't immediately
18 accept, that's bracketed, and it remains bracketed
19 until that issue is resolved. If a party notices
20 something, especially in the context of kind of a
21 legal technical change and they want to add
22 language and it's not controversial, the other

1 parties accept that during the course of the
2 negotiations, that language will never appear
3 bracketed.

4 PRESIDENT GAILLARD: So the fact it's not
5 bracketed means that someone came up, we don't know
6 who, came up with the idea to be specific as to
7 this exclusion, and the exclusion of the exclusion,
8 if you would?

9 MS. MENAKER: That would be the inference
10 that I would draw, based on our experience in doing
11 this and other Treaties.

12 PRESIDENT GAILLARD: And that it was not
13 discussed particularly. It was adopted as such by
14 the NAFTA parties.

15 MS. MENAKER: Or it could have been
16 discussed during the course of that particular
17 round of negotiations. However, since no one
18 objected, there was never any need to place the
19 brackets on it.

20 PRESIDENT GAILLARD: Right. And then this
21 language is carried forward, and then you see at
22 some point the blank is filled with the proper

1 number, and then it becomes what? It becomes
2 1901(3). It's not exactly the initial language.
3 It has been tightened a little bit, but I don't see
4 that as relevant, but tell me if I'm wrong. It's
5 the same idea. You end up with except for Article
6 2203 entry into force in the final text, and you
7 have--for some time you have with the exemption of
8 Article 2203, entry into force which to me means
9 the same thing. So, that's all we know about this.

10 And then the language at some point is the
11 final language which we have now in front of us,
12 and that's what we know about this.

13 So, I ask at the different point in time
14 the same question about, so we know
15 certainly--that's all we know from the documents
16 which have been exchanged, among them NAFTA
17 parties, even if you consider that includes only
18 two parties.

19 MR. McNEILL: That's correct.

20 PRESIDENT GAILLARD: You have not attached
21 particular relevance to this exception, with the
22 exception of the entry into force provision of

1 Article X which became except for Article 2203
2 entry into force.

3 Do you have anything to add on this on
4 either side? Or is it just what you said about the
5 negotiations meant that someone felt that one
6 should be more specific and everybody agreed it's
7 no big deal; I mean, it was not viewed as something
8 significant.

9 MS. MENAKER: I mean, that, in our view,
10 is the type of thing that is sometimes done at the
11 end of a Treaty negotiation, we call a legal scrub
12 sometimes during the midst of it, if someone
13 realizes you need a technical change like that. Of
14 course the provision, if you have literally nothing
15 in the agreement, can apply to it. You need to
16 have the entry into force provision apply, of
17 course.

18 PRESIDENT GAILLARD: If not, the provision
19 itself disappears when you sign the Treaty? If you
20 are really a fine lawyer.

21 MS. MENAKER: Well, yes, it would.

22 PRESIDENT GAILLARD: All right. That's

1 our understanding, but we wanted to see if it fits.

2 So, basically we don't know much about the
3 history of this language.

4 I turn to my co-arbitrators. Do you have
5 any questions on this?

6 I turn to claimant. Do you have any
7 comment or questions on these, queries on this, or
8 is your analysis of the record as is, because we
9 have read--I think all of the documents but we may
10 have missed something, you must have done a
11 thorough job I'm sure and maybe we missed
12 something. Other than the documents you discussed
13 which in your briefs which we have in mind. I'm
14 talking about travaux preparatoire.

15 MR. MITCHELL: No, our analysis is as
16 contained in the briefs.

17 PRESIDENT GAILLARD: So, your case is
18 based on the fact that it has not really been
19 discussed, but you have not, and you infer a
20 certain interpretation. That, we understand, but
21 you have not seen anything specific in the document
22 production or elsewhere?

1 MR. MITCHELL: Indeed, that is our point.
2 That if this was to have that effect, one would
3 have expected to see something in the document
4 production.

5 PRESIDENT GAILLARD: Right. Now, there is
6 an argument which it's a different question. There
7 is an argument which is that of the parallel
8 between the state-to-state arbitration and the
9 investor-state arbitration. I'm not saying it's
10 particularly relevant because I asked the question.
11 It's just it's one argument in the middle of a
12 series of arguments, and it assumes that this and
13 that is relevant, so I'm not, by asking a question,
14 prejudging the relevance of that, and the relevance
15 of the language or the structure of the text
16 vis-a-vis the objectives of NAFTA and so on. So,
17 it's just one question in the middle of the
18 reasoning, but I would like to have some
19 clarifications as to the structure of NAFTA with
20 respect to the specific technical comparison
21 between the state-to-state exclusions and the
22 investor-state exclusions. So, I would like to

1 tell you what I understand the exclusions to be and
2 tell me what I miss. I'm asking both parties, of
3 course. Tell me what I miss or what I
4 mischaracterize, so that we understand better the
5 relevant text. I'm not saying that this is--which
6 is relevant, of course, but we want to understand.

7 So, in terms of financial services, in
8 terms of financial services, you have an exclusion
9 of the investor-state disputes, which is found in
10 1101(3). Of course, you have to take into account
11 the language in Chapter 14 where there are some
12 exceptions, and I'm aware of that, but the primary
13 language is found in 1101(3); is that correct, on
14 the U.S. side?

15 MR. McNEILL: That is correct.

16 MR. MITCHELL: Yes.

17 PRESIDENT GAILLARD: Is there a parallel
18 exception other than what there is in Chapter 14, a
19 parallel exception for the state-to-state
20 arbitration regarding financial services? Maybe
21 the U.S. first.

22 So, is it your understanding? Maybe I can

1 rephrase the question. Is it your understanding?

2 MS. MENAKER: I think I understand your
3 question. Article 1414 in Chapter 14 provides that
4 Section B of Chapter 20, which is the
5 state-to-state dispute resolution mechanism applies
6 as modified by this Article, and to the settlement
7 of disputes arising under this chapter. And I
8 think the--I would have to confirm this, but I
9 think that the difference is in the selection of
10 the panelists that are going to serve on a
11 state-to-state dispute resolution pertaining to
12 financial services. There are special requirements
13 as to the--they have to be experts in financial
14 services which does not apply to Chapter 20.

15 PRESIDENT GAILLARD: It applies as
16 modified you would say?

17 MS. MENAKER: Yes.

18 PRESIDENT GAILLARD: And the provisions
19 are found in Chapter 14 itself, you would say?

20 MS. MENAKER: Yes.

21 PRESIDENT GAILLARD: It's 1404 and so on;
22 right? That's your understanding, too?

1 MR. LANDRY: Yes.

2 MR. MITCHELL: Yes, the provisions in
3 1414.

4 PRESIDENT GAILLARD: Thank you.

5 On national security, you have an
6 exclusion which applies both to the investor-state
7 arbitration and to the state-to-state arbitration,
8 which is found in 1138(1); is that correct? So,
9 your understanding is that there is--the exclusion
10 is the same? And it's found in the same--at the
11 same place; is that correct?

12 MR. McNEILL: Yes, I think that's correct.

13 MR. MITCHELL: I believe the specific
14 exclusion is found in 1138(2), which is the
15 dispute-settlement provisions of this section in
16 Chapter 20 shall not apply to the matters referred
17 to in Annex 1138(2).

18 PRESIDENT GAILLARD: For national security
19 it's 1138(1).

20 MR. MITCHELL: You're right. I'm sorry, I
21 misread the provisions of (2).

22 PRESIDENT GAILLARD: There is another

1 parallel provision in (2) for other matters?

2 MR. MITCHELL: Yes, that's correct.

3 PRESIDENT GAILLARD: Now if we come to
4 competition law, you have an exclusion of
5 state-to-state arbitration in 1501(3), and have you
6 an exclusion of the investor-state arbitration in
7 note 43, but here again, and you will refer to this
8 language in your pleadings on both sides, and here
9 again there are certain exceptions which I'm not
10 getting into, so my understanding is correct on
11 this?

12 MR. McNEILL: Yes, that's correct.

13 PRESIDENT GAILLARD: I'm glad you give
14 consistent answers. What about Canfor?

15 MR. MITCHELL: This part is easier than
16 the earlier part. Yes, we agree.

17 PRESIDENT GAILLARD: Thank you. And then,
18 of course, we come to the debated language. We
19 have--the U.S. position is that 1901(3) is
20 performing that function, excluding the
21 investor-state arbitration with respect to AD and
22 countervailing duty, and there is an exclusion of

1 the state-to-state arbitration in Article 2004.
2 One party uses this to contrast the language and
3 the other says it's a parallel, so it should be--it
4 should basically have the same function. We
5 understand the arguments. I'm just trying to
6 locate the provisions and make sure that we
7 understand that.

8 And we heard Canfor's position saying it's
9 not an imbalance, even if we are right it's not an
10 imbalance because the proper interpretation of
11 Chapter 11 and state-to-state provisions,
12 arbitration provisions mean that the state can
13 espouse--any state can espouse the position of the
14 parties so even if state-to-state arbitration could
15 happen on the same type of matters in spite of the
16 language of 2004; that's correct? You may want to
17 elaborate a little bit on is that.

18 MR. MITCHELL: That is correct. Our
19 position is that the state may advance the same--a
20 claim with respect to the same obligations. The
21 difference may well be in remedy, of course,
22 because the investor's sole remedy is compensation

1 by way of damages, but the provisions of 2004
2 relate only to those matters covered by Chapter 19,
3 and I think the Tribunal has our point that that
4 relates to the substitution of binational appellate
5 review for domestic appellate review, and the
6 constraints upon the amendment of the parties--

7 PRESIDENT GAILLARD: I'm sorry, sir. If a
8 state and not a private party like yourselves would
9 like to start state-to-state arbitration on the
10 same type of issues like this conduct which is at
11 the heart of your claims, they would have to
12 explain that it's not barred by 2004; right? So,
13 they would have to fight against the language of
14 except for the matters covered in Chapter 19 and as
15 otherwise provided in this agreement, the dispute
16 settlement provisions of this chapter shall apply
17 and so on and so forth.

18 So, that would be--one, it would be,
19 wouldn't it, the relevant provision? The core of
20 the matter would be the discussion on this
21 language; is that correct, if it were a
22 state-to-state arbitration? I'm asking counsel.

1 PROFESSOR HOWSE: If I may respond,
2 Mr. President. That's correct, a correct
3 interpretation of our view, a state would be
4 required to argue that the arbitration is not with
5 respect to a matter covered in Chapter 19, and that
6 would go to the definition of what matters are
7 covered in Chapter 19, what that expression means,
8 and we have made submissions on what that
9 expression means.

10 PRESIDENT GAILLARD: Right.

11 PROFESSOR HOWSE: But I also, even
12 if--that suffices I think to make it clear what we
13 are saying.

14 PRESIDENT GAILLARD: I have seen your
15 pleadings on this. I just want to ascertain that
16 this would be the relevant language, and the
17 argument would be a little different from what you
18 have here on under 1901(3), it would have to
19 go--it's not covered by Chapter 19. It's a similar
20 argument but on the basis of a different language.

21 PROFESSOR HOWSE: Except there may be
22 a--we might still have to consider the effect of

1 1901(3). Once this jurisdictional hurdle were
2 overcome, that is to say to the extent that
3 state-to-state dispute settlement has the
4 possibility of a different kind of relief. Then
5 you might have the live issue of whether you are
6 imposing an obligation with respect to a party's
7 antidumping and countervailing duty law by a
8 state-to-state ruling that doesn't give damages,
9 but that might be a ruling that goes to
10 theoretically, could go to changing the law.

11 But the reason I didn't say that, as I
12 realized, that if it's a matter not covered by
13 Chapter 19, and you have got over that
14 jurisdictional hurdle, it would be highly unlikely
15 that the remedy would be to change your antidumping
16 and countervailing duty law.

17 So, it's really--there is really a
18 parallelism, not an overlap.

19 PRESIDENT GAILLARD: Right. So, you say
20 that there is a parallel here. You say--I guess
21 you say in your pleadings that the idea of a
22 parallel is not necessarily right in the first

1 place, which the idea which was raised by the U.S.
2 that you need a parallel, and that's the right way
3 to interpret a Treaty, and I guess you disagree
4 with the idea that you cannot give to an investor
5 more rights than to a state in terms of the right
6 to arbitrate in the first place, and then you say
7 in any event they could on the basis of
8 interpretation you just provided us with.

9 PROFESSOR HOWSE: Well, we are saying, I
10 think, three things, but one of them is that there
11 is no necessity of parallelism, and another is that
12 we would disagree with the characterization of the
13 differences in rights here as giving more. We
14 think it's different rights related to different
15 remedies.

16 And finally, we are not persuaded that one
17 of the purposes of the NAFTA was to achieve some
18 kind of equality between whatever that may mean
19 between the investor-state and state-to-state
20 proceedings. But instead it was to craft
21 dispute-settlement mechanisms that would fulfill
22 the whole variety of the purposes of NAFTA, some of

1 which would need--you would need to craft remedies
2 available to investors to do. Others states,
3 others both, but the parties in the negotiation, as
4 we understand it, or to put it differently, the
5 arrangements that we have before us are driven by
6 the purposes that are stated in the Treaty and not
7 the attempt to seek some equality or parallelism
8 between state-to-state and investor-state
9 procedures.

10 PRESIDENT GAILLARD: Right, your position
11 is very clear on this, thank you.

12 On the U.S. side, do you have any comments
13 on this particular issue? Other than what you
14 wrote in your briefs, which obviously we have read
15 very carefully.

16 MR. McNEILL: I think our position is set
17 forth in our written and oral pleadings, and unless
18 the Tribunal has questions, I think we have made
19 our position clear.

20 PRESIDENT GAILLARD: No, no, just to give
21 you an opportunity to answer what was just said,
22 that's all, but your position is very clear, as in

1 writing?

2 MR. McNEILL: Yes.

3 PRESIDENT GAILLARD: Then, if you take
4 taxation, you have an exclusion in 2103(1) which
5 applies to both state-to-state arbitration and
6 investor-state arbitration with some caveats, with
7 some specific things which may not be excluded, so
8 basically you have an exclusion, but you have some
9 rights which you can exercise. For instance,
10 2103(6) would apply in the context of an
11 investor-state dispute. Is that a fair
12 characterization?

13 MS. MENAKER: Yes.

14 MR. MITCHELL: Yes.

15 PRESIDENT GAILLARD: I guess a question
16 which comes to mind is that in light of the fact
17 that the travaux are very limited on this language
18 1901(3), and given what we have seen a moment
19 ago--I'm not going through it--if that's all there
20 is, I would like some explanations on the contrast
21 with this situation and situations like competition
22 law or taxation where you have--tell me if I'm

1 wrong. I'm just thinking out loud. You have a
2 type of measures or a type of law, subject matter
3 which is difficult, which is sensitive, it states
4 they want to carve it out, to exclude the normal
5 application of Chapter 11. And if you take--and
6 that's understood. I mean, the rationale for doing
7 that is perfectly understood, but if you look at
8 competition law, if you look at taxation--and I'm
9 not going through the travaux for this purpose,
10 but it seems to have given rights to more
11 discussion, and a system which frankly prima facie
12 seems a little more elaborate with an exclusion,
13 but back door you may lose everything but the
14 expropriation provision, something more
15 sophisticated, if I might say.

16 And my question, I guess, is twofold. Is
17 that characterization fair; and second, if it is
18 fair, what is the reason for it?

19 (Pause.)

20 PRESIDENT GAILLARD: Who is answering?

21 Mr. McNeill?

22 MR. MCNEILL: Yes. Mr. President, I think

1 you asked a very general question, why are some of
2 these provisions more elaborate than some others
3 and I will start with a general answer and then
4 I'll address some of the specific provisions.

5 I think a lot of these exclusions are
6 performing different functions, and you have to
7 look at each chapter and each provision and see
8 what function that is performing and why it is
9 performing that particular function in that
10 context.

11 I will also add as well, since we looked
12 at the negotiating history that each chapter was
13 drafted by a separate negotiating team, so
14 sometimes you would find some language that may not
15 be identical from one chapter to the other. But
16 the primary point is that each of these exclusions
17 is performing a different function.

18 Now, if you look at 1501(3), for instance,
19 there you have an exclusion which is no more
20 complex, I would say, than 1901(3). It simply says
21 no party may have recourse to dispute settlement
22 under this agreement, but you notice a big

1 difference here it excludes just dispute
2 settlement. It doesn't exclude substantive
3 obligations.

4 If you look at 1901(3), however, it
5 excludes everything. In fact, it is so exclusive
6 of everything that the drafters thought it was
7 necessary to reincorporate the entry into force
8 provision, otherwise you might exclude the
9 provision itself from the entry into force.

10 And I think that was driven by, as we've
11 made in our submissions, the parties need to cabin
12 off Chapter 19 from the rest of the agreement
13 entirely, the antidumping and countervailing duty
14 matters are a very politically sensitive topic and
15 the thought was it should function as a stand-alone
16 part of the agreement.

17 And I think that's what Article 1901(3)
18 reflects. No provision in any other chapter shall
19 be construed to give rise to obligations with
20 respect to a party's antidumping and countervailing
21 duty law.

22 If we look at the exclusion in 2103, I

1 think there it's performing again a different
2 function. It says except as set out in this
3 Article, nothing in this agreement shall apply to
4 taxation measures and then you see certain
5 carve-outs from that and certain things are added
6 in, and I think that's driven by the particular
7 needs of taxation measures, that it was thought
8 that particular things that there would be an
9 exclusion and then there'd be some things added
10 back in, but you contrast that again with 1901(3),
11 it was a total exclusion, it was an exclusion for
12 dispute settlement, it was an exclusion for
13 obligations.

14 What is most interesting, I think, when
15 you--go ahead, I'm sorry.

16 PRESIDENT GAILLARD: Please continue.
17 Finish what you were saying--I'm sorry, I thought
18 you were done. Go ahead.

19 MR. McNEILL: You also pointed to 1101(3)
20 as an exclusion, provides this chapter does not
21 apply to measures adopted or maintained by a party
22 to the extent they are covered by Chapter 14.

1 Then if you look at the provisions in
2 Article 1401, you see that the dispute settlement
3 mechanism and certain substantive obligations from
4 Chapter 11 are incorporated directly into Chapter
5 14.

6 And you have to look at those two
7 provisions together. There's not--counsel for
8 Canfor said first it was taken out and then it had
9 to be reincorporated. Really it done sequentially
10 that way. They were put in the Treaty together,
11 and what they mean together is that the parties
12 assumed that investor-state did not automatically
13 apply outside of Chapter 11, to subject matters
14 outside of Chapter 11.

15 As I mentioned in my oral submission, I
16 believe, Chapter 11 and Chapters 14 cover very
17 similar topics. Chapter 11 covers investment.
18 Chapter 14 covers a subcategory of investment,
19 investment in financial services.

20 I think it's a very important fact that
21 the parties thought it was necessary to clarify
22 that these provisions had to be incorporated into

1 this chapter. In other words, there was no 1401,
2 there was no 1101(3), that it would not be clear
3 that it would apply at all. They felt it necessary
4 to clarify, even in a chapter that has such a
5 similar topic to Chapter 11 that had to be
6 incorporated in a very specific way. The
7 substantive obligations and the dispute-settlement
8 mechanism.

9 And then you go back too Chapter 19, and
10 you don't see that incorporation of Chapter 11
11 obligations. And there you have a chapter that
12 covers a very different subject matter, covers
13 antidumping and countervailing duty law, and you
14 see general provisions in the NAFTA that suggest
15 that the parties intended to treat investment and
16 trade differently. Trade is handled in
17 Chapters--in Parts 22 and three. Investment is in
18 Part Five. If you look at Article 1139, definition
19 section of Chapter 11, it says investment does not
20 mean claims to money that arise solely from
21 commercial contracts for the sale of goods or
22 services by nationals or enterprises.

1 So, there is a general intent not to
2 include trade matters in Chapter 11. Antidumping
3 countervailing duty disputes are arguably one
4 subcategory of those matters.

5 So if it was necessary to incorporate
6 these provisions directly into Chapter 14, such a
7 similar chapter, then certainly one would expect to
8 find similar provisions in Chapter 19, had the
9 parties intended the antidumping matters to be
10 subject to the substantive obligations and to the
11 dispute-settlement mechanism in Chapter 11.

12 PRESIDENT GAILLARD: Thank you,
13 Mr. McNeill. It was very clear. The question I
14 wanted to ask at one point was that in certain
15 cases you have the carve-out of the expropriation.
16 It's not excluded specifically. Can you explain
17 why? I'm referring to taxation. We discussed it a
18 moment ago. You have an exclusion in 2103(1), but
19 then you have the back door. Certain things are
20 arbitrable. Maybe I could ask the question
21 differently or ask a second question.

22 Does that take care of the labeling

1 argument?

2 (Pause.)

3 MS. MENAKER: I think to the best of our
4 knowledge, the provision in Article 2103(6), we
5 believe, is there to provide an exception so that
6 the exclusion for tax measures will not apply where
7 there might have been an expropriation, but it
8 recognizes that one could--conceivably make the
9 argument that any tax is an expropriation, someone
10 is taking your money, and that is a fear that
11 regulatory agencies often have is that their
12 taxation powers will be challenged as expropriatory
13 in the normal course of business, and I think it's
14 well accepted that ordinary taxes are not
15 expropriations.

16 But there is the issue that as you said,
17 it can arise in two instances, but I don't think
18 it's confined to the labeling instance. I think--

19 PRESIDENT GAILLARD: It goes a little
20 further than that.

21 MS. MENAKER: Yes.

22 PRESIDENT GAILLARD: But it's one way to

1 take care of that problem.

2 MS. MENAKER: Exactly. Because if you
3 have something that is an expropriatory measure,
4 you label it as a tax, you can't get away with
5 that, but by the same token, I think there could be
6 a case where something perhaps is legitimately
7 characterized as a tax, but yet it is
8 expropriatory.

9 So, what this does is it provides the
10 state parties with a means to ensure that their
11 ordinary taxation measures are not--that they are
12 not subject to dispute resolution for that ordinary
13 taxation measures and only--that's why you need to
14 go through this mechanism if you are challenging a
15 tax, and it is only if the tax authorities of the
16 two state parties that are involved, including the
17 party of which the national who was the claimant,
18 if both parties agree that the taxation measure is
19 not an expropriation, the claim will then not go
20 forward.

21 So, it grants some prerogative to the
22 states to basically stop claims that are frivolous

1 in that regard, and if there is no consensus on
2 that matter, then the claim can go forward.

3 PRESIDENT GAILLARD: Thank you,
4 Ms. Menaker.

5 On Canfor's side, on the same issues, you
6 wish to make a few remarks?

7 MR. MITCHELL: Just briefly, if I could go
8 back to your twofold question which was related to
9 whether the characterization of the approach the
10 parties took the carve-outs for competition,
11 national security, and taxation was more elaborate
12 than that taken in respect of what it is argued as
13 a carve-out in 1901(3).

14 Absolutely. The approach taken was more
15 elaborate, and your second question, was what was
16 the reason for that, and it's our submission that
17 the reason for that is simply that 1901(3) was not
18 intended to have the effect that the United States
19 contends. And if I can just elaborate on that from
20 what we do know from the negotiating history, and
21 we have just--in the course of submissions
22 immediately heard reference to the national

1 security carve-out, the taxation carve-out, and the
2 competition and state enterprises carve-out. In
3 respect of each of those, the lawyers' revision
4 makes clear that those are provisions to be placed
5 outside the investment chapter. The parties turned
6 their mind to that and dealt with that extensively.
7 In the absence of any corresponding indication with
8 respect to Article 1901(3) and CVD and AD suggests
9 that that intention was not the same.

10 Sorry, just one other matter that came up,
11 and I believe this is Mr. McNeill's point. He made
12 the assertion that matters of trade--trade is dealt
13 with in parts two and three and investment is dealt
14 with in part five, and therefore trade and
15 investment are dealt with separately under the
16 Treaty. That again is a point that has already
17 been litigated in Chapter 11 arbitrations, and the
18 easiest example is the Pope and Talbot case, where
19 Canada argued that the measures of which Pope and
20 Talbot complained were measures relating to trade
21 in goods, and therefore they didn't fall within
22 Chapter 11. The Tribunal did not accede to that

1 assertion, and noted that matters can relate to
2 more than one chapter of the Treaty.

3 PRESIDENT GAILLARD: Thank you. Do you
4 have a determination as to the impact on your case
5 of the introduction at some point of the exclusion
6 of the entry into force provision of the scope of
7 1901(3)?

8 MR. MITCHELL: I will turn that to
9 Professor Howse.

10 PROFESSOR HOWSE: Yes. As a matter of
11 state responsibility, the entry into force of the
12 Treaty would require changes to antidumping and CVD
13 laws within the meaning that Canfor attributes to
14 that expression based on the definition in 1902,
15 and so very simply, because what the parties--it is
16 our surmise that because what the parties had in
17 mind when they were thinking about what they wanted
18 to do with the provision like 1901(3) was to
19 protect Chapter 19 against the interpretation, an
20 interpretation that would lead to obligations of a
21 nature involving amendment or conditions on
22 amendment or retention of the law. They would have

1 had to have made this exception because again, as
2 just a matter of basic rules of state
3 responsibility, if they didn't make the exception,
4 there could be just the absurd result that someone
5 would come along and say that 19--by virtue of
6 1901(3) you don't even have to amend your laws in
7 order to make the Treaty effective.

8 It's a pretty--I would say that that would
9 be the reasons.

10 And again, just as 1901(3) could be argued
11 to be concerned with being very cautious about the
12 possibility of improper interpretations, this rider
13 is also an expression of caution, the exception to
14 the exception is an expression of caution that
15 someone could come along and just say, well, we
16 don't have to do any changes to our laws, even if
17 those changes are implied by state responsibility
18 to implement the Treaty.

19 So, in our view, it confirms our view that
20 what 1901(3) is about is something that would make
21 a party do something to its law or conditions
22 related to amending or changing or retaining law.

1 PRESIDENT GAILLARD: Thank you, Professor
2 Howse. That exhausts my questions for the time
3 being. The Tribunal still has a number of
4 questions but if the parties are prepared to go on
5 for as long as the Court Reporter doesn't collapse,
6 i.e. 45 minutes to an hour max, we can go on, and
7 maybe we can be done. I need to speak to my
8 co-arbitrators before I confirm that.

9 So, you would be amenable, I take it, to
10 stay for another hour, if we had to?

11 (Pause.)

12 PRESIDENT GAILLARD: We will go on for a
13 little while, and we will ask questions, but if you
14 feel that you want to reflect on certain issues, we
15 are certainly available tomorrow morning as
16 planned, and you can--we can decide by the end of
17 the day, but we are certainly available to hear
18 your answers tomorrow, if you prefer to answer
19 certain questions tomorrow as opposed to rushing
20 and answering tonight.

21 Joseph, do you want to start your
22 questions?

1 ARBITRATOR WEILER: At least I can start.
2 I have still maybe a couple of questions to both
3 parties. One question to Mr. McNeill, can I go
4 back to the waiver issue. Because again it might
5 be of some consequence, if 1121.

6 I just need you to clarify, if I
7 understood you correctly, and I apologize if I
8 didn't, you said that the kind of procedure covered
9 by Chapter 19 proceedings was not the kind of
10 procedure envisaged by the waiver. Maybe to
11 sharpen the question, let's imagine that it was not
12 Chapter 19, but that it was just the Court of
13 International Trade, the regional thing of which
14 Chapter 19 binational panels are meant to be a
15 substitute.

16 Would you still say that because it maybe
17 doesn't go to the Tribunal but actually to the
18 notion of relief being sought.

19 Canfor replied to that, but it's almost
20 like giving you the possibility for a rejoinder.

21 MR. MCNEILL: Our main point on the
22 exclusion from the waiver requirement was really

1 that it provides an exception to that requirement
2 for administrative tribunals or courts under the
3 law of the disputing party. And I think you have
4 to look at that language and decide whether the
5 parties intended to include within that language
6 the binational panels. A Binational panel is not
7 an administrative tribunal, and it's not a court.
8 In response the Canfor said well, that raises these
9 constitutional issues if you say binational panel
10 is not a court.

11 And to the contrary, if the parties had
12 intended to include the binational panels within
13 this language, they would have said the binational
14 panels and by saying binational panels, it doesn't
15 raise a constitutional issue.

16 Now, in terms of the type of remedy that
17 is available in Chapter 19, I merely pointed out
18 that the relief they seek there, and the potential
19 of getting back at the end of the day a check for
20 your duties paid plus interest, at least makes
21 Canfor's claims inconsistent with the intention of
22 this Article, which is to prevent dual proceedings

1 in which there could be the possibility of double
2 recovery.

3 So, could this refer to the Court of
4 International Trade? I will say that the Court of
5 International Trade is, in fact, a court under the
6 law of a disputing party. So I would say yes, the
7 Court of International Trade would apply to this,
8 but the binational panels would not.

9 ARBITRATOR WEILER: So, that means I at
10 least partially misunderstood your original reply
11 because I thought your original reply went to the
12 nature of relief sought, not to the status of the
13 body before whom the relief would be sought. And
14 because I had understood your or one of your
15 colleague's argument before that said the
16 binational panels was simply substituting for the
17 Court of International Trade, and if therefore they
18 were substituting for the Court of International
19 Trade, maybe it wasn't thought necessary to specify
20 also before binational panels because they were
21 just anything that would apply before the Court of
22 International Trade might be thought to--in fact,

1 that would mean that the Court of International
2 Trade--the binational panels were not a full
3 substitute but in some respects at least an
4 inferior substitute because this type of thing
5 would be barred. Whereas if it remained in
6 national hands, it would not have been barred. Is
7 that a correct implication of what you're saying?
8 And again I apologize if I misunderstood. It's
9 late, and we are all tired.

10 (Pause.)

11 MR. McNEILL: If I understand your
12 question correctly, first of all, I guess you're
13 asking whether the--whether 1121 could be drafted
14 loosely to mean binational panels because the
15 binational panels stand in the shoes of the court,
16 and so it was just thought that this would be a
17 general term that might capture the binational
18 panels; is that correct?

19 ARBITRATOR WEILER: That's in response to
20 your argument that it doesn't cover binational
21 panels.

22 MR. McNEILL: Right. I think our response

1 is that it would be extraordinarily sloppy drafting
2 if the parties had intended--had actually conceived
3 that this provision would grant jurisdiction under
4 two separate chapters of the NAFTA with respect to
5 antidumping and countervailing duty measures and
6 countervailing duty determinations, and this is the
7 way they did it. They didn't make it explicit.
8 They didn't say this chapter--that the same claims
9 can be submitted to Chapter 11 and to Chapter 19.
10 Instead they referred to it in an exception to the
11 waive requirement as the court. So I think it
12 would be an implausible reading of that to say that
13 that is what they meant because it would have been
14 very easy certainly for the parties to say before
15 an administrative Tribunal, a court, or the
16 binational panels under Chapter 19. I think that's
17 what you would expect to see if there were going to
18 be such an extraordinary result that you could
19 bring claims--that a NAFTA party would actually
20 agree to subject itself to claims under two
21 chapters of the NAFTA with respect to the same
22 measures. I think you would expect to see some

1 clear language, that that's what the parties
2 intended than what you see in the exception in
3 Article 1121.

4 ARBITRATOR WEILER: It's something that I
5 might be interested to hear the response of Canfor.

6 MR. LANDRY: I will make one comment to
7 that and then I'll pass it over to Professor Howse.
8 Firstly, let's not forget that the binational
9 panels in the system of review is now in the
10 domestic law of the United States, so those
11 binational panels are actually part of the domestic
12 law in the United States. The terminology
13 administrative tribunal or court is--is an
14 encompassing term on a lot of different types of
15 tribunals or courts.

16 Professor Howse, do you want to add to
17 that?

18 PROFESSOR HOWSE: Yes, first of all, thank
19 you for this opportunity. The question of whether
20 proceedings are possible under more than one
21 chapter of the NAFTA and I understood the United
22 States to have just said that claims under two

1 chapters of NAFTA with respect to the same measures
2 were simply excluded. I only wished to know that
3 there have been cases where claims under more than
4 one chapter of NAFTA have been fully adjudicated,
5 and one that comes to mind is--again I'm going from
6 memory here--I believe the trucking dispute between
7 the United States and Mexico which went to a
8 Chapter 20 panel involved claims under both the
9 investment and services chapters of NAFTA, if I'm
10 not mistaken, but if we have the chance to--I mean,
11 if we don't end today and we have a chance, I would
12 be prepared to be more precise about the cases
13 where provisions in more than one chapter have been
14 adjudicated.

15 And apparently in Myers, my colleague is
16 suggesting that the Tribunal was prepared to
17 consider that a services case could be brought in
18 addition to investment based on the same measures
19 and the same claims.

20 But the second observation is that the
21 consequence of saying that for purposes of 1121(2)
22 a binational panel is not an administrative

1 tribunal or court under the law of the disputing
2 party, would in our submission be contrary to the
3 purposes of NAFTA and indeed to many statements,
4 and again we would have to take a bit of time to
5 find them, that not only would the replacement of
6 Court of International Trade review by binational
7 panels preserve fully rights and obligations of
8 those affected, but actually would in some sense
9 enhance them, that it was better, that it would
10 provide it more rights. But the implication of
11 saying that here binational panel is not such an
12 administrative tribunal or court under the law of
13 the disputing party would be to say now that you
14 have Chapter 19, you have fewer rights with respect
15 to relief. And that doesn't seem to us to be
16 consistent with the purposes.

17 And the second observation is really and
18 again with the Tribunal's indulgence if we have the
19 time overnight we will look into this more
20 carefully, but under statutes, it is our
21 understanding that you will find under domestic
22 statutes some language that says for purposes of

1 this statute a binational panel shall be considered
2 to be a court, but again we would have to look into
3 this and I'm just going from memory, and if we have
4 a chance to do so, and the Tribunal will indulge
5 us, we might want to make a more detailed
6 submission about the way in which under the law of
7 disputing parties a binational panel is deemed in
8 that law or legislation to be an administrative
9 Tribunal or in particular a court.

10 ARBITRATOR WEILER: Thank you. Can I ask
11 a different question again first to the United
12 States and maybe--I want to go back, when you
13 explained very lucidly the different rationales for
14 exclusions, I had two difficulties with it. One
15 was at some level I thought that it was a non
16 sequitur because you had assumed that the effect of
17 1901(3) was to be a total exclusion on the--and
18 then you explained why this made sense, and what we
19 really were trying to understand is whether or not
20 it was a total exclusion, so one could not put the
21 result as the explanation for what it was.

22 PRESIDENT GAILLARD: You look at

1 result--you look at position and you said does it
2 make sense. I mean, it doesn't strike me as odd,
3 but--

4 ARBITRATOR WEILER: But the alternative
5 made equal sense to me, so I just didn't find it
6 pulling one way or another.

7 But do you remember we talked about the
8 comparative advantage of the investors, et cetera?
9 Here, if I understood you correctly, and again
10 apologies if I didn't, you said that antidumping
11 and countervailing duty being so delicate and
12 political, sensitive, et cetera, they wanted to
13 carve it out and not allow it. When you replied to
14 my question earlier this morning about whether or
15 not this construction of 1901(3) put NAFTA
16 investors into a situation inferior to BIT
17 investors, for example, I understood your argument
18 to be, well, in some cases there are modern BITs or
19 that are other BITs which are better than NAFTA in
20 some respects, that one might come back to that,
21 but if it thought, why wouldn't it have been
22 thought in relation to all those BITs if

1 antidumping, et cetera, is so delicate. It's true
2 that they don't have a Chapter 19, but Chapter 19
3 is just meant to be a binational panel still
4 applying American law and all the rest.

5 Wouldn't the same rationale, at least in
6 some respect, have to be applied, that you don't
7 want to allow something that was subject to the
8 Court of International Trade and all the rest to be
9 subject independently to a Chapter 11 type?

10 MS. MENAKER: Unless I'm misunderstanding
11 your question, I think the clear answer is we don't
12 have a similar type of exclusion in our BITs
13 because BITs don't cover antidumping and
14 countervailing duty measures. It's the same type
15 of problem that we have been having here when we
16 have been coughing our answers in terms of we can't
17 conceive of a claim that would fall within Chapter
18 19 and yet give rise to an investment despite over
19 which a Tribunal would have jurisdiction under
20 Chapter 11 absent 1901(3).

21 So, we do have BITs out there. They
22 cover--they offer investor-state dispute resolution

1 for investment disputes, but we don't think that
2 anybody could properly bring a claim under a BIT to
3 challenge an antidumping or countervailing duty
4 determination, even though there is no sort of
5 1901(3) provision just because you would look at
6 the scope and coverage of the BIT itself, and it
7 wouldn't cover it. So, you would make a
8 jurisdictional objection based on the scope and
9 coverage of the BIT that it covers investment
10 disputes, and that would not qualify.

11 ARBITRATOR WEILER: But you did think,
12 that according to your construction, you did think
13 that it was sufficient and important to exclude it
14 by putting in 1901(3).

15 MS. MENAKER: Yes.

16 ARBITRATOR WEILER: If it was so far out
17 and unthinkable, why would it?

18 MS. MENAKER: Because NAFTA is--what we
19 have here is we have a Free Trade Agreement with a
20 BIT inside of it, so just by virtue of being in the
21 same actual document makes it a bit of a higher
22 risk that a claimant will take advantage of

1 different opportunities in that respect.

2 And I would also just mention with respect
3 to our BIT partners, we don't have Free Trade
4 Agreements with most of those BIT partners either,
5 so they're not in a situation where they--where
6 there would be an international obligation that we
7 have accepted with respect to our antidumping and
8 countervailing duty law that they would bring in
9 any regard.

10 ARBITRATOR WEILER: But they're subject
11 to--since NAFTA antidumping law is American
12 antidumping law, Canadian antidumping law, Mexican
13 antidumping law, they are subject to antidumping
14 law, and they are subject to determinations, and
15 you might have taken the same precaution in saying
16 we want you to know that is we consider outside,
17 but I understand your answer.

18 I just have one question to, unless Canfor
19 wants to comment, I have one question to Canfor.
20 The question to Canfor is to rephrase in my way
21 something that Mr. Harper asked before and I still,
22 even I'm not yet--I wasn't quite satisfied by the

1 answer given, and I'm going to try again. 1901(3)
2 says that no other part of the--no other chapter of
3 the agreement shall be construed to imposing
4 obligations on the party with respect to the
5 parties' antidumping law, so what we really would
6 like to know, apart from the answer that the
7 President's question is still pending, is those
8 aspects of the Statement of Claim specific where
9 you would argue that relief granted by a Chapter 11
10 proceeding should not be construed as imposing an
11 obligation in relation to antidumping law. So, not
12 the generic argument which I think we understood,
13 but actually if one could walk through the
14 Statement of Claim and say relief in relation to
15 this, this, this, and this would not be construed
16 as imposing an obligation in relation to
17 anti-dumping law submission, and we can break for
18 five minutes so both parties can get these
19 documents before we ask the questions. Thank you.

20 (Brief recess.)

21 PROFESSOR HOWSE: We could certainly walk
22 through the Statement of Claim, if you have a copy.

1 And we would be prepared to respond with respect to
2 each of the matters that we're asking for relief
3 on.

4 But also bearing in mind that part of the
5 damage to Canfor has occurred through the pattern
6 of conduct, and that we are also submitting that.
7 Besides the individual acts, the whole pattern of
8 conduct has--is a violation of, in particular, the
9 minimum standard of treatment. So, in looking at
10 individual provisions, we just would like that to
11 be borne in mind.

12 So, I have the Statement of Claim in hand,
13 which contains our various assertions or claims
14 concerning the conduct with which we seek relief.
15 And I would be--and my colleagues would be happy
16 to, if the Tribunal wished to point to particular
17 paragraphs there to explain why the provision of
18 relief would not create an obligation with respect
19 to antidumping or countervailing duty law.

20 I mean, if there are particular provisions
21 that are giving the Tribunal concern on that front,
22 I would be happy to look at those and talk about

1 why they don't create such an obligation.

2 ARBITRATOR WEILER: We think that we would
3 be happy to listen to anything you would like to
4 point out and that Canfor would like to point out
5 under that direction, rather than us taking you
6 through Canfor's Statement of Claim.

7 PROFESSOR HOWSE: First of all, I would
8 like to emphasize that we view each of the acts as
9 such that--of such a nature that the relief we are
10 asking for will not impose an obligation with
11 respect to AD and CVD laws, as we understand that
12 expression. So, one thing I could do or we could
13 do, which would take a long time, would be to go
14 through every single act we describe and then talk
15 about our view of the pattern of conduct as a
16 whole. Or I could look--I could give you some
17 examples and reason through an example.

18 ARBITRATOR WEILER: Why don't you reason
19 through one or two examples.

20 PROFESSOR HOWSE: Certainly. Let's take
21 our examples concerning the claims of the Byrd
22 Amendment which might seem to be a very hard

1 example because in the Byrd Amendment we are
2 referring to a statute. I just need to find the
3 exact paragraphs of our allegation--

4 PRESIDENT GAILLARD: Can you start at
5 paragraph 141.

6 PROFESSOR HOWSE: So, let's start with
7 141. The actions of the respondent in adopting the
8 Byrd Amendment and its application or intended
9 application to softwood lumber countervailing and
10 antidumping duties levied on Canfor such that those
11 duties will be redistributed from Canfor to the
12 petitioners who are already receiving the benefit
13 of being able to subject Canfor and its investors
14 to a costly, arbitrary and discriminatory legal
15 process that has resulted in the imposition of
16 prohibited duties upon them is blatantly
17 discriminatory and violates NAFTA's Articles 1102,
18 1103, and 1105.

19 PRESIDENT GAILLARD: Before you go on, you
20 just read the paragraph, but before you go on, do
21 you still maintain the words "in adopting" in the
22 first line?

1 PROFESSOR HOWSE: Yes. And in wording the
2 Statement of Claim in this fashion, we relied upon
3 the characterization by the United States before a
4 panel of the World Trade Organization of the Byrd
5 Amendment.

6 And if I may, I would like to read that
7 characterization. It's summarized or quoted by--

8 PRESIDENT GAILLARD: I don't understand,
9 I'm sorry. This is a clarification point because I
10 understand your latest submissions to say, for
11 instance, at paragraph 26 of the rejoinder that the
12 adoption of a law is not a problem, but what's the
13 problem is you say it's the application. To me,
14 it's the thrust of your argument that the adoption
15 itself may not be caught by this provision we are
16 discussing, but its application is different
17 because you read the word "law" in a particular
18 way.

19 So, how do you reconcile these two ideas?

20 PROFESSOR HOWSE: And this is why I wanted
21 to look at specific examples because I think the
22 examples play themselves out differently,

1 Mr. President, because in this particular case this
2 law has--the United States has characterized this
3 law as, quote-unquote, having nothing to do with
4 the administration of antidumping and
5 countervailing duty laws. Those are the words that
6 the United States used before the WTO panel,
7 nothing to do with the administration of the
8 antidumping and countervailing duty laws.

9 So, in this particular instance, we would
10 argue that we could--here we relied on the United
11 States's own characterization that this particular
12 law had nothing to do with antidumping or
13 countervailing duty laws. But if the United
14 States's own characterization before the panel
15 proceedings which is what we relied on in drafting
16 the Statement of Claim is erroneous, then you're
17 right, we may have a problem with adoption here.
18 That's right.

19 PRESIDENT GAILLARD: My understanding was
20 that you had implicitly dropped these terms because
21 I'm surprised you insist on those terms. I'm not
22 saying it's right or wrong. I was just questioning

1 the consistency of that with your most recent
2 pleadings, but that's fine. I mean, whatever is
3 your position is your position. I don't want to
4 put the words into your mouth.

5 PROFESSOR HOWSE: Mr. President, I believe
6 you're correct in the way that you've read our
7 latest submission in that we have clarified the
8 focus of our concerns.

9 I was meaning more to just explain how we
10 could--how we could have come to a conclusion here
11 that the adoption itself posed a problem, given our
12 general theory that it's really where the
13 application of the law is concerned that 1901(3)
14 doesn't exclude. So, that was only the point I
15 wished to make. In fact, you have completely
16 understood our gloss in the rejoinder on the main
17 focus of our claim about the Byrd Amendment.

18 PRESIDENT GAILLARD: Thank you.

19 Mr. Clodfelter, you want to answer
20 specifically on this?

21 MR. CLODFELTER: Actually, I was confused.
22 We did hear this morning that the claim is not

1 based upon the Byrd Amendment, not based upon the
2 statute, which is, of course, contrary to the text
3 of the paragraph 143. So, we are a little confused
4 still. What's the claim about here?

5 PRESIDENT GAILLARD: I guess it's not a
6 question, it's just a remark; right?

7 MR. LANDRY: For the record,
8 Mr. President, we do not withdraw paragraph
9 whatever it was that Mr.--I don't have it in front
10 of me because he's using my paragraph.

11 PRESIDENT GAILLARD: It's paragraph--it's
12 the words "in adopting" in paragraph 141 of the
13 Notice of Arbitration and Statement of Claim. So,
14 it's noted. The position--there are two different
15 things here. The position of the parties, the
16 contention, what is it that your position is, and
17 what the argument is. Now, one thing has to be
18 crystal clear is what the position is and what
19 you're requesting.

20 So, what you're saying here is we don't
21 drop a word of what we said in the initial
22 pleading, the Notice of Arbitration and Statement

1 of Claim. That's your position; correct?

2 MR. LANDRY: With respect to the Byrd
3 Amendment as referenced by Professor Howse, you're
4 correct.

5 PRESIDENT GAILLARD: Right. So, that's
6 one thing.

7 Then comes the argument--and I don't want
8 to mix the two levels--when we heard a lot of
9 argument on this, and I don't think as far as we
10 are concerned we have any questions. We think the
11 positions of the parties are very clear, but I want
12 you to have an opportunity to further elaborate on
13 it if you so wish, but it's not a question from the
14 Tribunal. So, on Canfor's side, Mr. Mitchell or
15 Mr. Howse?

16 PROFESSOR HOWSE: Yes, exactly. As
17 Mr. Landry suggested, my comments go to the
18 argument, and I think that we have--in our most
19 recent submission we have enriched the argument,
20 but we--and focused the argument about the Byrd
21 Amendment. But no, we have not actually dropped
22 the claim.

1 But I did want to--and I also wanted to
2 explain how not dropping it is consistent with our
3 general theory because of the way in which the
4 United States itself has characterized this
5 particular statute as, quote-unquote, having
6 nothing to do with the administration of AD and CVD
7 law.

8 PRESIDENT GAILLARD: Thank you for
9 clarifying the rationale, the argument.

10 We have no questions on this, but on the
11 U.S. side, do you have a comment or a point you
12 want to make on this?

13 (Pause.)

14 MR. CLODFELTER: Mr. President, we may
15 want to return to this later before the evening is
16 out, but not right now.

17 PRESIDENT GAILLARD: This is fine.

18 Professor Weiler has no further questions.

19 Mr. Harper, do you have a few questions?

20 ARBITRATOR HARPER: Oh, yes.

21 PRESIDENT GAILLARD: Maybe more than a
22 few.

1 (Pause.)

2 PRESIDENT GAILLARD: Let's have two
3 minutes. The Court Reporter would like two-minutes
4 pause, so let's have a two-minutes pause.

5 (Brief recess.)

6 PRESIDENT GAILLARD: We are back on the
7 record. Mr. Harper will have a few questions, and
8 we will see in a moment if we need to reconvene
9 tomorrow or not. We are completely in your hands,
10 and we are available tomorrow to hear you, so we
11 will decide when we hear your answer to the
12 question, and frankly it would be your call, so we
13 would want you to make a determination on that,
14 after Mr. Harper has asked his questions.

15 Conrad, do you want to go ahead?

16 ARBITRATOR HARPER: Thank you, Mr.
17 President.

18 Professor Howse, is Canfor asking this
19 Tribunal to adjudicate the issue of whether the
20 Byrd Amendment is or is not an antidumping law or a
21 countervailing duty law?

22 (Pause.)

1 PROFESSOR HOWSE: Well, in this particular
2 instance, Mr. Harper, I'm not sure that the
3 Tribunal would need to adjudicate it in the sense
4 that our position is the same. It appears as the
5 position that the United States has stated in this
6 matter before the World Trade Organization. So, I
7 think both parties are essentially of one mind
8 that, as the United States put it, the legislation
9 in question, the CDSOA, has nothing to do with the
10 administration of antidumping and countervailing
11 duty laws. It would seem very odd, and we would
12 take the position--we have a legal position on
13 this, too, if the United States were now to claim
14 otherwise that it claimed at the time before the
15 WTO panel, and--but you would have to ask them that
16 question, if they changed their view of the Byrd
17 Amendment since they made that submission to the
18 WTO panel.

19 And if they have changed their view, then
20 we would want to say something about the legal
21 implications of they're now taking a different view
22 than the one they're taking in their oral statement

1 to another international tribunal.

2 ARBITRATOR HARPER: Let me take this
3 opportunity--it would have occurred to me
4 anyway--to inquire of the respondent what is the
5 position of the United States on that question.

6 MS. MENAKER: Our position is that all of
7 Canfor's claims based on the Byrd Amendment are,
8 indeed, barred by Article 1901(3), as we stated on
9 our written submission since the very first
10 submission that we made, is that any obligation
11 imposed on the United States with respect to the
12 application of that law, although it has never been
13 applied or insofar as Canfor's claims are concerned
14 would be imposing an obligation on the United
15 States with respect to its antidumping and
16 countervailing duty law in contravention of Article
17 1901(3).

18 I discussed, I believe it was, yesterday
19 and in our written submissions that again the only
20 way in which the Byrd Amendment has had any effect
21 on Canfor could be their contention that the--it
22 improperly incentivized the domestic industry to

1 support the petitions before the DOC and ITC, and
2 therefore it is essentially an argument that the
3 Commerce Department and the International Trade
4 Commission improperly instigated the investigations
5 when, if they had applied U.S. law on the issue of
6 standing properly, they would not have instigated
7 those investigations.

8 And the instigation of an investigation
9 is, of course, conduct that is inextricably
10 intertwined with the administration and application
11 of the antidumping and countervailing duty laws.
12 So, in that respect, their claim with regard to the
13 Byrd Amendment is barred by 1901(3).

14 ARBITRATOR HARPER: Because the matter
15 seems to be one of some subtlety and perhaps
16 complexity, I should perhaps pursue the matter,
17 Ms. Menaker, by asking you whether the United
18 States has a position as to whether or not the Byrd
19 Amendment is itself a measure that is an
20 antidumping law or a countervailing duty law.

21 MS. MENAKER: Yes, I would direct the
22 Tribunal's attention to the definition of an

1 antidumping and countervailing duty statute that is
2 in Annex 1911, and that is defined as the relevant
3 provisions of Title VII of the Tariff Act of 1930,
4 as amended. And, in fact, the Byrd Amendment or
5 the Subsidy Offset Act of 2000 is an amendment to
6 Title VII of the Tariff Act. So, I believe that
7 answers your question and responds very briefly to
8 remarks that Canfor made.

9 The issue before the WTO was a different
10 issue. The issue was whether the Byrd Amendment
11 was an action against dumping or an action, a
12 specific action against dumping or in a specific
13 action against subsidization within the meaning as
14 those terms are understood in WTO jurisprudence and
15 whether they thus violated the antidumping code and
16 the SCM agreement; and indeed, the United States
17 argued they did not. We lost that case. We
18 appealed it, as was our right, and the WTO
19 appellate body upheld the panel's decision in most
20 respects, not in all respects and not with respect
21 to this improper standing question.

22 I think that there is certainly tension in

1 Canfor's argument insofar as it criticizes the
2 United States for complying with a Chapter 19
3 Panel's decision, albeit begrudgingly. So, they
4 criticize us because we were unhappy that we did
5 not prevail, and yet we did comply.

6 To now suggest that the United States is
7 somehow at fault for having made an argument before
8 another international tribunal that it lost, and
9 that it cannot--that it is bound by arguments or
10 particular statements that it made to that
11 Tribunal, insofar as they are even relevant in this
12 context and cannot itself reform its view to some
13 extent based on the decision rendered by that
14 Tribunal I don't think is a fair position. Thank
15 you.

16 ARBITRATOR HARPER: In light of
17 Ms. Menaker's statement, Professor Howse, does
18 Canfor have a different view, or any view as to
19 whether or not the Byrd Amendment is an antidumping
20 law or a countervailing duty law?

21 PROFESSOR HOWSE: Very briefly, I think
22 the United States has made some explanation of the

1 change of what appears to be a change of position
2 from that it took in characterizing municipal law
3 before the WTO panel.

4 I would only say that the panel and the
5 appellate body were careful to rule only under
6 the--on the question of whether the Byrd Amendment
7 fell within the meaning of certain provisions in
8 the WTO agreements.

9 My understanding is that the panel and the
10 appellate body could not have, as it were,
11 overruled the overall characterization by the
12 United States that the Byrd Amendment,
13 quote-unquote, had nothing to do with the
14 administration of antidumping and countervailing
15 duty laws. It could only find that that
16 characterization by the United States nevertheless
17 did not mean that for purposes of particular
18 provisions of the WTO agreements that the U.S. had
19 not violated those particular provisions.

20 PRESIDENT GAILLARD: With respect, it's
21 not the question. The question was: What do you
22 think about this issue?

1 PROFESSOR HOWSE: With respect, sir, I
2 think we need to talk among ourselves because we
3 had understood it as something that was not in
4 dispute. Now you're asking what we think
5 independently of the U.S. characterization. Could
6 we have a moment?

7 PRESIDENT GAILLARD: Of course. Please,
8 you can speak among yourselves.

9 (Pause.)

10 PROFESSOR HOWSE: Thank you for your
11 indulgence.

12 It's our understanding that where a party
13 has changed or modified its antidumping law or
14 countervailing duty law under 1902(2) of NAFTA,
15 it's required to follow certain requirements which
16 include a notification requirement that they're
17 engaging in such an amendment of their antidumping
18 and countervailing duty law.

19 And it is also our understanding that no
20 such notification was made by the United States
21 under the terms of 1902(2). And in our submission,
22 having not followed 1902(2) requirements with

1 respect to changes or modifications of antidumping
2 or countervailing duty law, the United States
3 cannot come now and take advantage of an exception
4 which, even on their theory, on its very words,
5 only applies to law that is, quote-unquote,
6 antidumping and countervailing duty law. In other
7 words, if it is antidumping and countervailing duty
8 law, then they would need to do what they have to
9 do and modifying that law into 1902(2). If they
10 haven't done it, then we don't believe it would be
11 open even on their interpretation of 1901(3) to say
12 it's not.

13 PRESIDENT GAILLARD: In what you say there
14 is a point of fact and an argument, and on the fact
15 I would like to turn to the U.S.

16 Is it a correct assertion that the Byrd
17 Amendment has not followed Article 1902(2)
18 requirements?

19 MS. MENAKER: I apologize, but I could not
20 say so definitively. I would have to check with my
21 colleagues from the USTR.

22 PRESIDENT GAILLARD: That's fine.

1 ARBITRATOR WEILER: Do you accept that
2 it's germane to the question?

3 MS. MENAKER: Not at all. I don't think
4 it has anything to do with Article 1901(3).

5 PRESIDENT GAILLARD: We have a factual
6 allegation, and I wanted to see that, and then we
7 go back to the argument. We understand the
8 argument, maybe we won't elaborate on the argument
9 now. Do you want to say a word on the argument
10 part?

11 MS. MENAKER: First, just to respond to
12 Canfor's argument that somehow our position has
13 changed. Just to be clear, our position has never
14 changed in this arbitration. From the very
15 beginning, we said all of Canfor's claims were
16 barred by virtue of 1901(3), and in our reply we
17 specifically addressed their Byrd Amendment claim
18 and said for specific clarify all of their claims,
19 including all claims relating to the Byrd
20 Amendment, are barred by Article 1901(3). So, our
21 position has remained clear throughout this
22 arbitration.

1 I don't think this Article 1902 issue--let
2 us presume now. Like I said, I do not know
3 factually whether or not Article 1902 had been
4 complied it or whether it even applies, but let us
5 just presume for the sake of argument that Canfor
6 is correct and that there had been some violation
7 of Article 1902. That does--that does nothing, has
8 no bearing on the issue of whether 1901(3) applies.
9 In fact, it's somewhat circular in this regard
10 because the obligation is to notify an amendment to
11 your antidumping and countervailing duty law, and
12 then Canfor is now arguing that if you don't do
13 that notification, that somehow the amendment
14 therefore becomes not an antidumping or
15 countervailing duty law, and any obligation you
16 impose on it is not in violation of 1901(3).

17 So, that begs the question, then couldn't
18 a party completely get around the notification
19 requirements because any time it ceased to notify,
20 then the amendment would be deemed to be not a part
21 of its antidumping and countervailing duty law, and
22 he would not have to comply with all of the

1 requirements in Chapter 19 relating to amendments.

2 ARBITRATOR HARPER: I sense in this
3 dialogue a resurgence of the issue that from time
4 to time my colleagues have pursued, namely the
5 issue of labeling and whether or not one could
6 avoid an obligation by mislabeling or incur an
7 obligation by correctly labeling. And I see, if I
8 may, that this issue admits at least of arguments
9 along that line. I think it would be helpful for
10 us to know what the facts are--and I think I speak
11 for my colleagues in that regard--and then we would
12 be glad to entertain the arguments as well, but I
13 think we need to know what the facts are.

14 PRESIDENT GAILLARD: I made a note of
15 that. Ms. Menaker, can you make a note that we
16 want to know what the answer is on a factual basis
17 on the use or not of 1902 with respect to the Byrd
18 Amendment.

19 MS. MENAKER: We certainly can, but
20 again--

21 PRESIDENT GAILLARD: I understand the
22 argument that it's not relevant, but we have a

1 point of fact disputed, and we want clarity on
2 that.

3 MR. LANDRY: Mr. President, I wonder if I
4 could just add one thing in response to a point
5 that Ms. Menaker made.

6 PRESIDENT GAILLARD: Certainly.

7 MR. LANDRY: I will leave it very short.

8 The protections that are provided for
9 under 1902(2)(D) regarding the amendment, it's very
10 clear now that amendment was made--and for sake of
11 argument let's assume there was no notice given--it
12 was an amendment that did not comply with the WTO
13 requirements under the--as required under that
14 section. And that was the only point I wanted to
15 make in response.

16 PRESIDENT GAILLARD: I understand the
17 argument.

18 So, Mr. Harper will continue his questions
19 for a little while, and then we will break shortly.

20 ARBITRATOR HARPER: Let me turn to a
21 different subject.

22 (Pause.)

1 PRESIDENT GAILLARD: Mr. Harper will ask
2 the question, and then we will see--or I'm asking
3 the parties whether they prefer to discuss it
4 tomorrow when they know the topic or they prefer to
5 answer now. It would be your call, keeping in mind
6 the fact that we cannot go on forever because of
7 the Court Reporter, who has been on for a long
8 time.

9 ARBITRATOR HARPER: Thank you,
10 Mr. President.

11 Let me ask counsel for Canfor the
12 following question: Suppose Chapter 11 of the
13 NAFTA had an Article that stated, "This chapter
14 shall not be construed as imposing obligations on a
15 party with respect to the party's antidumping law
16 or countervailing duty law. Such law in each
17 instance includes relevant statutes, legislative
18 history, regulations, administrative practice, and
19 judicial precedents."

20 Would it be Canfor's position, if that
21 were the case, that its Statement of Claim can be a
22 basis for relief from this Tribunal?

1 MR. LANDRY: I think Canfor would prefer
2 to answer that question tomorrow when we are fresh.

3 PRESIDENT GAILLARD: I think it's fair
4 because that's obviously a question which may lead
5 to follow-up questions. I mean, I don't think you
6 can just answer by yes or no that kind of question,
7 so it's only fair. So, we would resume tomorrow,
8 if you would agree, at nine. Is that all right for
9 both sides? What do you have in mind in this
10 respect?

11 MR. MITCHELL: My only constraint is I
12 need to be at the airport by 3:30, so hopefully we
13 won't be going that long.

14 PRESIDENT GAILLARD: On the U.S. side? Do
15 you have any particular time requirements?

16 MS. MENAKER: 9:00 is okay with us.

17 PRESIDENT GAILLARD: So, we will resume
18 tomorrow at nine.

19 And my guess is we should be done
20 certainly in the morning. We had in mind an hour
21 discussion, something like that, but forecasts are
22 always subject to certain caveats. So, I adjourn

1 the meeting for the day. Thank you very much, and
2 we will meet tomorrow at nine. Thank you.

3 (Whereupon, at 6:58 p.m., the hearing was
4 adjourned at 9:00 a.m. the following day.)

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1 CERTIFICATE OF REPORTER

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3 I, David A. Kasdan, RDR-CRR, Court

4 Reporter, do hereby testify that the foregoing

5 proceedings were stenographically recorded by me

6 and thereafter reduced to typewritten form by

7 computer-assisted transcription under my direction

8 and supervision; and that the foregoing transcript

9 is a true record and accurate record of the

10 proceedings.

11 I further certify that I am neither

12 counsel for, related to, nor employed by any of the

13 parties to this action in this proceeding, nor

14 financially or otherwise interested in the outcome

15 of this litigation.

16

17 DAVID A. KASDAN, RDR-CRR

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